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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. 374

HAYWOOD WASHUM, an Individual, d/b/a LOS ANGELES-YUMA FREIGHT LINES, and SVENSSON FREIGHT LINES, an Arizona Corporation,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPERSTATE LINES, CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, HOPPER TRUCK LINES, LEE WAY MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., PACIFIC MOTOR TRUCKING COMPANY, THUNDERBIRD FREIGHT LINES, INC., T. I. M. E. FREIGHT, INC., and WESTERN GILLETTE, INC.,
Appellees.

Appeal from the United States District Court for the District of Arizona.

JURISDICTIONAL STATEMENT.

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Appellees.

Appeal from the United States District Court for the District of Arizona.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the District of Arizona entered on April 1, 1969, affirming orders of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are involved.

OPINIONS BELOW.

The opinion, consisting of two paragraphs and denominated "Order, of the U. S. District Court for the District of Arizona," from which this appeal is taken, is not, as of the time of the preparation of this statement, known to be officially reported, but is appended hereto as Appendix A, pages A-1 and A-2.

The prior opinion of the Interstate Commerce Commission, which was affirmed by the District Court, is reported in 104 M. C. C. at pages 838, etc., copy of which is hereto attached as Appendix B, pages A-3 through A-57.

JURISDICTION.

This suit was brought under Title 28, U. S. C., §§ 1336, 1398, 2284 and 2321-2325, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court was entered on April 1, 1969, and Notice of Appeal was filed in that Court on May 29, 1969.

The jurisdiction of the Supreme Court to review the decision of District Court by direct appeal is conferred by 28 U. S. C., § 1253, and by the decisions of this Court in Penn-Central Merger and N. & W. Inclusion Cases, 389 U. S. 486.

QUESTIONS PRESENTED.

Whether the Interstate Commerce Commission may abandon a long-standing rule of practice before the Commission and apply to the Appellants a different rule not heretofore applied in motor carrier cases whereby the Certificates of the Appellants are revoked and the sale of a Certificate is denied, with the effect that Appellants are simply put out of business.

STATEMENT OF THE CASE.

This is a review of three proceedings below in the Interstate Commerce Commission. In order fully to understand the import of this appeal, it is necessary to consider not only each of the three cases below separately, but to consider the manner in which the three interrelate with each other so as to produce the ultimate result of which Appellants now complain.

Background Information.

Defendant, Svensson Freight Lines ("Svensson"), an Arizona corporation, has operated in interstate commerce for a number of years, first under a so-called "Second Proviso" Certificate of Registration, and subsequent to 1963, under a Certificate issued to it as a single state operator under § 206 (a) (6) of the Interstate Commerce Act. The second proviso operation was conducted for some years before Don Washum purchased an interest in that company in 1957.

In the Spring of 1957, Defendant, Don Washum, and his cousin, James Eldree Washum, each purchased 50% of the outstanding common stock of Svensson. Don Washum was Vice President of Svensson from that time until January 21, 1963, when he became President after acquiring the interest of his cousin.

On June 5, 1963, Svensson replaced its second proviso registration with a Certificate under § 206 (a) (6) and (7) of the Interstate Commerce Act. Svensson operates in interstate commerce basically between Phoenix and Yuma, Arizona.

A third respondent, Haywood Washum, and his brother, Jim Washum, were originally co-partners doing business as Los Angeles-Yuma Freight Lines by virtue of a Cer-

tificate purchased from one James N. Clint on October 1, 1956, which authorizes operations between Yuma, Arizona and Los Angeles, California. Jim Washum is the father of James Eldree Washum and Haywood Washum is the father of Don Washum.

On January 22, 1963, Jim Washum transferred all of his interest in Los Angeles-Yuma Freight Lines to Haywood Washum, and since that time he has operated that business as a sole proprietor. Haywood Washum has never been an officer in Svensson, nor has he ever been on the Board of Directors of Svensson.

Under the two Certificates described, Svensson and Los Angeles-Yuma have provided service between Los Angeles and Phoenix by means of interline since 1957.

Nature of the Proceedings Below.

The first of the proceedings here under review was a complaint action filed by certain competitors of Svensson and Los Angeles-Yuma. The crux of the complaint was that Haywood and Don Washum are collectively in joint and common control of both Svensson and Los Angeles-Yuma. The Commission so found and since that joint control was never authorized by the Commission ordered them to cease and desist.

Appellants do not now take issue with the findings of the Commission in this respect, except to state that there is no finding below nor is there evidence of record to support a finding that the actions of the two defendants, Haywood and Don Washum, in effectuating such joint control, albeit unlawfully, were in bad faith, that is to say they did not wilfully and wantonly violate § 5 of the Interstate Commerce Act.

By the time the Commission reached that conclusion, Svensson and L. A.-Yuma had been providing a transpor-

tation service to the shipping public between Phoenix and Los Angeles for well over 10 years without challenge. By virtue of the Commission's order to cease and desist, they stood to lose their entire livelihood built over many years. Further, the shippers and receivers whom they had served for many years stood to lose what apparently had been a valuable transportation service.

In an effort to rectify this situation, Svensson filed two applications before the Commission, the outcome of which are also the subject of review in this proceeding. The first was in Finance Docket No. MC-F-9618, in which Svensson sought to purchase L. A.-Yuma. Second, in Docket No. MC-96784 (Sub-No. 2), Svensson sought to convert its § 206 (a) (6) Certificate into a § 207 Certificate of Public Convenience and Necessity. If these two applications had been granted, the difficulties encountered by the two Washums would have been cured.

The extension application was heard by Joint Board No. 47 which Board also heard the complaint action and found the unlawful joint control. There, Svensson and L. A.-Yuma produced exhibits showing thousands of shipments which had been handled in the past by the two of them in interline service. They then adduced evidence from 10 public witnesses that they had been using the services of Svensson and L. A.-Yuma and that they had a need for the continuation of those services in their business.

Upon consideration of that record, Joint Board No. 47 found that the Certificate applied for by Svensson was slightly different from the Certificate which it held under § 206 (a) (6) and that for that reason it could not consider evidence of past operation as proof of convenience and necessity. Such evidence would normally be considered in a conversion case of that type. The Joint Board, later upheld by the Commission, was in error at that point because the differences between the two are so slight that

they would not have affected the transportation characteristics of a single one of the shipments involved. The Joint Board then found that the evidence of the 10 supporting public witnesses, **standing alone**, was not sufficient to justify a grant of authority, particularly in view of the fact that there was sufficient common carrier service available between Los Angeles and Phoenix to insure that the public interest would not be damaged. It also found that the application could not be a true conversion of § 206 (a) (6) to a § 207 Certificate because the original former Certificate had been void at the time it was issued in view of the fact that Svensson was under common control with L. A.-Yuma, a multi-state operator.

The findings in the two dockets discussed above then had a direct bearing upon the finding of the Examiner in Docket No. MC-F-9618. He found that inasmuch as Joint Board No. 47 had held that the § 206 (a) (6) Certificate of Svensson was invalid when it was issued, it therefore did not exist, so that the Commission then had no jurisdiction over the transaction wherein Svensson sought to purchase L. A.-Yuma. Thus, each of the proceedings in turn had a distinct bearing upon the other.

THE QUESTION IS SUBSTANTIAL.

The Matter of Unlawful Control.

The unlawful control question completely permeates this whole matter. That finding is about to deprive Haywood and Don Washum of a business which they have spent well over 10 years building, not to mention the shipping public which is about to be deprived of the good and valuable services rendered by these two carriers for that same period of years and upon which they have come to rely. It was found at the instance of competing carriers who waited over 10 years to complain and who

now expect to enjoy a windfall in the form of traffic now being handled by Svensson and L. A.-Yuma.

The joint control found to exist and to be unlawful is a technical violation of the statute. It does not exist per se, but had to be found by sifting a myriad of individual facts, some of which tended to show a common control and some of which did not.

On balance, the Commission found that more of these facts tended to show that joint control exists than tend to show that it does not. The two Washums did not consciously start out to effectuate such control and indeed were unaware that they had done so until the Commission decision in the complaint case. Thus, there was no finding of bad faith on their part.

Even though there was no finding of bad faith, the finding of unlawful control dogged their every footstep through the subsequent proceedings so that, in fact, the unlawful control finding is the basis upon which both the extension application and the § 5 purchase application were ultimately denied. It is submitted that far too much weight has been placed upon the technical violation by the Washums in the unlawful control case and that the later denial of the extension application and the § 5 purchase application predicated upon that ground was arbitrary and capricious.

THE § 206 (a) (6) CERTIFICATE SHOULD HAVE BEEN CONVERTED.

The granting of a Certificate under § 207 of the Act must be only upon strict proof of public need for it is the grant of a new Certificate which has a competitive impact on other carriers already in the field, which impact must be measured and minimized consistent with the public interest. Conversely, the conversion of a §

206 (a) (6) Certificate requires no such strict proof for the operation is already in progress under the Certificate. The conversion is in effect a mere change of form.

The Joint Board improperly held Svensson to the first and more strict measure of proof because (1) of the differences between the Certificate held and the Certificate sought, and (2) the § 206 (a) (6) Certificate must be issued to a carrier operating wholly within one state and not in common control with a multi-state carrier. In view of the joint control found by the Joint Board to exist between Svensson and L. A.-Yuma, it also found that the Certificate issued in 1963 was void at the time of issue.

Thus, the Joint Board treated the § 206 (a) (6) Certificate as if it were brand new when issued in 1963. That in fact was not true. Svensson had been the holder of what was then known as a second proviso registration for many years before Don Washum was ever connected with it. Certainly, there is no showing in this record, nor is there any finding, nor could there have been such, that the original second proviso registration held by Svensson was improperly issued by the Commission.

In 1963, the Act was changed so that a single state operator was required to exchange its registration for a Certificate. That did not require any proof of convenience and necessity. It merely required application made timely under the provisions of the statute by any carrier holding a second proviso registration whereupon the new certificate would be issued. That certificate was issued in lieu of what had been held before. It was not a new certificate, but rather was a continuation in another form of the rights which had been held by Svensson for many years.

No certificate issued by the Commission can be revoked except after proper proceedings and findings by the Com-

mission. To do so would be to deprive the holder of his property without due process of law. It was therefore not void at the time of issue as found by the Commission.

The Joint Board also held Svensson to the first and infinitely more strict quantum of proof also because it found that the § 207 Certificate requested by Svensson was not precisely the same in its wording as that which it held under registration. It is true that there are some small differences between the two. However, the documents which underlie the showing of the past performance of Svensson and L. A.-Yuma in interline service conclusively show that the differences in the two certificates would not have one ounce of material effect on the ultimate transportation service rendered on any of the involved shipments insofar as the shippers and receivers were concerned. The Joint Board hid behind a mere technicality in finding that because of these differences, it could not consider the evidence of past operations. The differences in the two certificates are differences of form and not of substance.

Svensson also produced 10 public witnesses who testified that they have been using the services of Svensson and L. A.-Yuma and that those services were needed by them. That, along with the showing of the past operations of these carriers, was more than sufficient to provide a basis for granting the extension application in view of the fact that the application simply considers an ongoing of an operation which has been in existence for many years, and not a new operation.

The Joint Board found that evidence, standing alone, to be insufficient to grant the application. The ultimate result is that the Commission has required a higher quantum of proof of Svensson than it would require of any other applicant seeking to convert a § 206 (a) (6) certificate.

THE FINAL RESULT OF THESE THREE CASES IS WHOLLY INEQUITABLE.

It is important to see who is harmed by the final outcome of these decisions; who is benefited by the final outcome; and whether the consequences which flow from these decisions are commensurate with the activities of the Appellants.

The people who stand to be infinitely harmed by these decisions are Haywood and Don Washum who will be virtually put out of business. The second group that stands to be materially harmed is the shipping public who has been using the services of these carriers through the years and who have testified that they need their continuation.

The Joint Board stated that the shipping public would continue to enjoy adequate service as provided by the complaining and protesting carriers. While that may be true, the final result of this matter will be to provide a windfall for those carriers which they do not deserve. If the findings of the Commission are correct in the complaint case, the unlawful control complained of has existed since 1957. The complaining carriers waited well over 10 years to raise the issue so that during that period of time, the competitive situation as between the complaining carriers and the defendants has fully crystallized. Any traffic which the complaining carriers might have lost by virtue of the unlawful control has long since gone and any effects that they might have suffered because of that loss has long since been sustained and forgotten. If these carriers were so indignant about this matter, and the consequences to their business were so great, it would seem that they would have raised the question long before they did and long before the competitive situation had crystallized.

The only result which can now occur is that these carriers will in effect cut up among themselves the traffic presently being enjoyed by Svensson and L. A.-Yuma, so that each will, to that extent, be the recipient of a windfall. This is a wholly and completely inequitable result in view of the lack of bad faith by the Washums and in view of the technical nature of the violation of the statute.

THE TREATMENT ACCORDED THE APPELLANTS BELOW.

The matter was presented to the Court below on a complaint which raised a number of pivotal and consequential legal questions, and at the hearing on the matter, there was before the Court, in addition to the original complaint, a motion to amend the complaint so as to present to the Court a question concerning the fairness of the proceedings before Joint Board No. 47 consisting of the Honorable E. P. ("Eddie") Williams, Jr., a former member of the Arizona Commission and a political enemy of the Washums because of their pressing bribery charges against him.

The Court below dismissed the latter charge as being not soon enough raised and dismissed the complaint concerning the proceedings before the Commission with the statement that the Court was satisfied that the Commission followed the law and based findings on evidence.

Appendix A hereto presents both paragraphs of the Court's decision.

A timely application for restraining order pending this appeal was presented and granted by the three-judge District Court, with the effect that, unless sooner dissolved, the restraining order will be in effect until decision by this Court.

As demonstrated above, the questions presented are substantial, and require plenary consideration for their resolution.

CONCLUSION.

Therefore, it is respectfully requested for the reasons herein discussed that this Court note jurisdiction to the end that this appeal be docketed for plenary review with briefs and arguments on the merits.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

The United States District Court
For the District of Arizona.

Haywood Washum, et al.,
Plaintiffs,
v.
United States of America,
Defendant.
No. Civ. 6886 Phx.

Order.

(Filed April 1, 1969.)

Before: Jertberg and Browning, Circuit Judges, and Craig, District Judge.

Plaintiffs' motion for leave to amend the complaint and to adduce additional evidence is denied. The issue which plaintiffs seek to present was not submitted to the Commission, and may not be raised for the first time in this court. **United States v. Tucker Truck Lines**, 344 U. S. 33, 36-37 (1952); **United States v. Capital Transit Co.**, 338 U. S. 286, 291 (1949); **United States v. Hancock Truck Lines**, 324 U. S. 774, 778-80 (1945); **Neisloss v. Bush**, 293 F. 2d 873, 880 (D. C. Cir. 1961). Moreover, with exceptions not applicable here, our review of the Commission's order is limited to the record presented to the Commission. **Interstate Investors, Inc. v. United States**, 287 F. Supp. 374, 385-86 (S. D. N. Y. 1968), **affirmed** ... U. S. ... (1969) (No. 755 O. T. '68, Jan. 27, 1969).

Based upon our examination of the record before the Commission in the light of the authorities cited by the parties, we are satisfied that the Commission followed the law and that its findings are supported by substantial

evidence, including inferences reasonably drawn therefrom. We would not be warranted in overturning the Commission's orders simply because there is also substantial evidence in the record which would have supported findings favorable to the plaintiffs. **Consolo v. Federal Maritime Comm'n**, 383 U. S. 607, 619-21 (1966); **Illinois Central R. R. v. Norfolk & Western R. R.**, 385 U. S. 57, 66 (1966). Accordingly, the complaint is dismissed, and the temporary restraining order heretofore entered is vacated.

GILBERT H. JERTBERG,
JAMES W. BROWNING,
United States Circuit Judges;

WALTER E. CRAIG,
United States District Judge.

APPENDIX B.

MF-3049

INTERSTATE COMMERCE COMMISSION.

No. MC-F-9618

SVENSSON FREIGHT LINES—PURCHASE—HAYWOOD WASHUM

[104 M. C. C. 838]

No. MC-F-9618[1]

Svensson Freight Lines—Purchase—Haywood Washum

1. In No. MC-F-9618, application of Svensson Freight Lines for authority to purchase operating rights and certain property of Haywood Washum denied.
2. In No. MC-C-5262, defendants Haywood Washum and Don Washum, and each of them, found to be exercising control and management in a common interest of the operations of Haywood Washum, doing business as Los Angeles-Yuma Freight Lines, with the operations of defendant Svensson Freight Lines. Certificate of registration canceled. Defendant Svensson Freight Lines ordered to cease and desist operations in interstate commerce.
3. In No. MC-96784 (Sub-No. 2), public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle of specified commodities over regular routes between described points in Arizona. Application denied.

Pete H. Dawson for applicant in Nos. MC-F-9618 and MC-96784 (Sub-No. 2) and defendant in No. MC-C-5262.

R. Y. Schureman for protestants in Nos. MC-F-9618 and MC-96784 (Sub-No. 2) and for complainants in No. MC-C-5262.

Peter C. Byrne for defendants in No. MC-C-5262.

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[1] This report also embraces No. MC-C-5262, *Consolidated Coppérstate Lines, et al., v. Haywood Washum*, an individual d. b. a. *Los Angeles-Yuma Freight Lines, et al.*, and No. MC-96784 (Sub-No. 2), *Svensson Freight Lines Conversion Application—Arizona*.

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, Commissioners *Tuggle*, *Bush*, and *Stafford* (Commissioner *Stafford* dissents), held at its office in Washington, D. C., on the 25th day of April 1968.

Upon consideration of the applications, the complaint, and the record in the above-entitled and embraced proceedings, including the report and recommended orders of Joint Board No. 47 (board) and of the hearing examiner, each served October 20, 1967,[2] the [104 M. C. C. 839] exceptions filed thereto by applicants-defendants, and the replies thereto by complainants-protestants.[3]

It appearing, That the respective findings and conclusions of the hearing examiner in No. MC-F-9618, and of the board in No. MC-C-5262, and No. MC-96784 (Sub-No. 2) are proper and correct in all material respects; that the exceptions and replies otherwise raise no new or material matters of fact or law not adequately considered and properly disposed of by the hearing examiner and the board in their respective reports; and that said excep-

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[2] These three related matters were heard on a consolidated record before a hearing examiner and Joint Board No. 47. Separate recommended orders were served. By order dated February 19, 1968, No. MC-C-5262, was assigned to division 3 for concurrent handling and disposition with this proceeding and No. MC-96784 (Sub-No. 2).

[3] Complainants in No. MC-C-5262 are Consolidated Copperstate Lines, Consolidated Freightways Corporation of Delaware, Hopper Truck Lines, Lee Way Motor Freight, Inc., Milne Truck Lines, Inc., Navajo Freight Lines, Inc., Pacific Motor Trucking Company, T. I. M. E. Freight, Inc., Thunderbird Freight Lines, Inc., and Western Gillette, Inc. Each, except Consolidated Freightways of Delaware, oppose the application in No. MC-96784 (Sub-No. 2), and each, except Consolidated Freightways and Lee Way Motor Freight, oppose the application in No. MC-F-9618. Applicants-defendants, and complainants-protestants, shall hereinafter be referred to as applicants and protestants, respectively.

tions and replies, otherwise, are not of such a nature as to require the issuance by division 3 of a report discussing the evidence in the light of such pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the replies does not warrant a different result from that reached by the hearing examiner and the board in their respective reports, that the statement of facts, the conclusions and the findings of the hearing examiner and the board being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That, in No. MC-F-9618, the order of the hearing examiner, which would deny the application, be, and is hereby, adopted as the order of the Commission, division 3, effective 20 days after the date of service hereof;

It is further ordered, That, in No. MC-C-5262, the order of the Joint Board No. 47, which finds the applicants in violation of section 5(4) of the Interstate Commerce Act, which orders applicants to cease and desist such violation, and which finds that a certificate of registration was improvidently issued to Svensson Freight Lines, in No. MC-96784 (Sub-No. 1) on June 5, 1963, and has been invalid since that date, be, and is hereby, adopted as the order of the Commission, division 3, effective 20 days after the date of service hereof; and

It is further ordered, That, in No. MC-96784 (Sub-No. 2) the order of Joint Board No. 47, which would deny the application, be, [104 M. C. C. 840] and it is hereby, adopted as the order of the Commission, division 3, effective 20 days after the date of service hereof.

The statement of facts, conclusions and findings of Hearing Examiner Samuel C. Shoup in No. MC-F-9618 follows:

By joint application filed December 20, 1966, Svensson Freight Lines, an Arizona corporation, of Yuma, Ariz. (vendee), and Haywood Washum, doing business as Los Angeles-Yuma Freight Lines, of Yuma, Ariz. (vendor), seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of the interstate operating rights set forth in appendix A hereto, of the transportation business, and of certain physical property of the latter in exchange for 1,720 shares of common voting stock of the vendee to be issued. Both vendee and vendor are motor common carriers subject to part II of the act. Their aggregate gross operating revenues exceeded $300,000 for the period of 12 consecutive months ending not more than 6 months preceding December 1, 1966, the date of agreement to sell, executed by the parties. For the year 1966, gross revenues of vendee were $276,196, and of vendor, $658,175.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon accompanied by the reasons therefor. Hearing was held on a consolidated record with two related matters assigned for hearing before Joint Board No. 47, Nos. MC-96784 (Sub-No. 2) and MC-C-5262, described in footnote 1 above, on May 8 through 11, 1967, at Phoenix, Ariz. Each of the matters is disposed of in a separate report and recommended order. Consolidated Copperstate Lines, Hopper Truck Lines, Milne Truck Lines, Inc., Navajo Freight Lines, Inc., Pacific Motor Trucking Co., Thunderbird Freight Lines, Inc., T. I. M. E. Freight, Inc., and Western Gillette, Inc., oppose the application.

Vendee was incorporated in Arizona sometime prior to 1957. At the time of hearing, one, Donald L. Washum

owned all of its stock consisting of 430 issued shares. Vendee's directors then consisted of Donald L. Washum, president, his wife Evelyn Washum, secretary and treasurer, and Verlan Lee, vice president, who also was employed as a dock foreman by vendor. Prior to and continuously subsequent to 1957, the vendee conducted motor common carrier intrastate and interstate operations in Arizona. A certificate of convenience and necessity, No. 3857, dated August 8, 1962, was issued to vendee by the Arizona Corporation Commission. Pursuant to application filed under section 206(a)(7) of the act, as amended October 15, 1962, this certificate resulted in the issuance to vendee of a certificate of registration, No. MC-96784 (Sub-No. 1), dated June 10, 1964, the commodity and territorial scope of which is set forth in appendix B hereto. In June or July 1957, Donald L. Washum and his cousin, James Eldree Washum, each purchased 50 percent of all the issued and outstanding stock of vendee from its then owner, Gus Svensson. They borrowed funds from the First National Bank of Yuma for the down payment required by Gus Svensson and the discharge of certain tax obligations of Svensson. The promissory note which they issued to secure the loan was cosigned by Haywood [104 M. C. C. 841] Washum, father of Donald L. Washum. About January 21, 1963, James Eldree Washum withdrew from vendee and his stock was sold to and purchased by Donald L. Washum who then became its president.

By application, No. MC-96784 (Sub-No. 2) filed with the instant application and mentioned in footnote 1 above, vendee seeks motor common carrier authority corresponding in scope to some extent with that in the described certificate of registration. In a report in that proceeding served concurrently herewith, the joint board recommends denial of that application for reasons set forth therein. Evidence of vendee's past operations and testimony of 10 shippers was offered in support of both that and the

instant application. The abstracts of some 2,569 (principally less-than-truckload) shipments transported by applicant from March 1, 1966, through March 31, 1967, between Phoenix and Yuma and interlined at Yuma almost exclusively with vendor for beyond movement to or from Los Angeles and vicinity and Imperial County points, were presented to show continuous past operations proposed to be continued as single-line service if the considered application is granted. The abstracts were prepared from about 10 freight bills selected at random for each day of operation to show continuous service between points within the scope of its operating authority. However, vendee presented no evidence relating to interpretation of its State certificate which is incorporated in the certificate of registration under which the described traffic moved. The wording of the certificate of registration, without interpretation to the contrary, indicates that much of the abstracted traffic is beyond the scope of the certificate of registration. Freight bills produced in support of the abstracts did not reveal stops en route for partial unloading, and the dispatch sheets which might have disclosed this information were not made available. Pertinent testimony of the supporting shippers contains expressions of desire to use vendee's proposed single-line service, if authorized.

Vendor, with headquarters at Yuma, has conducted motor common carrier operations as a sole proprietor under two names. One is Los Angeles-Yuma Freight Lines, the business of which is the subject of transfer in the considered application, and the other is H. L. Washum & Donald L. Washum, doing business as H. L. Washum & Son, under which vendor conducts a livestock transportation business. Interstate operations under the former were conducted between Yuma and Los Angeles and other points within the scope of vendor's certificate No. MC-14045, set forth in appendix A. In connection therewith,

vendor participated in joint-line movements, principally with vendee, since the certificate was issued on June 5, 1963. Among other things, the certificate authorizes service between Yuma Test Station and San Luis as requested in vendee's Sub-No. 2 application. Haywood Washum and his brother, Jim Washum, purchased the certificated authority from one, James M. Clint, on October 1, 1956, and a certificate was issued in the partnership name on December 26, 1956. Partnership operations continued under the certificate from that time until Haywood Washum purchased his brother's interest therein on January 22, 1963, and a certificate in vendee's name was issued June 5, 1963. Since that time, vendee has continued operations under the certificate. Abstracts of 42 truckload and 897 less-than-truckload direct or interlined shipments transported by vendor from March 1, 1966, through March 16, 1967, selected in the same manner as those in the described abstracts of vendee, to show continuous [104 M. C. C. 842] operations are in evidence. Neither the vendor or vendee's president could determine from supporting transportation documents whether the abstracted shipments were picked up or delivered in vendor's or vendee's equipment.

Vendee's balance sheet as of December 31, 1966, shows assets aggregating $108,972, consisting of: Current assets of $23,936 (including cash, $643, accounts receivable, $22,216, and prepaid expenses, $1,077), fixed assets—property, less allowances for depreciation, $82,625, other deferred charges, $105, and deposits, $2,306. Liabilities were: Current liabilities, $51,662 (including accounts payable, $:2,999, accrued taxes, $2,113, notes payable, $17,126, accrued insurance and vacation pay, $3,568, and long-term debt due within 1 year, $5,856), deferred liabilities, $4,543, capital and surplus (430 shares par value $100), $43,000, and earned surplus, $9,767. Its income statement for 1966 shows operating revenue, $276,197, operating ex-

penses, $263,743, officers salaries, $10,800, and net profit, $1,654.

Vendor's balance sheet as of December 31, 1966, shows assets aggregating $206,719, consisting of: Current assets, $63,555 (including cash, $5,291, accounts receivable, $49,784, and prepaid expenses, $8,480), fixed assets, $137,539 (including revenue equipment less allowance for depreciation, $62,881, buildings less allowance for depreciation, $32,951, office furniture and fixtures less allowance for depreciation, $6,707, land, $4,000, and franchise and permits, $31,000), and other assets, $5,625. Liabilities were: Current liabilities, $92,437 (including accounts payable, $43,761, accrued taxes and expenses, $17,068, equipment and other obligations—current $31,608), deferred liabilities, $46,450, capital account (reflecting a 1966 loss of $4,806), $67,832.

Vendor's income statement for 1966 shows operating revenue $658,175, operating expenses, $662,981, and operating loss, $4,806. Book value of vendor's revenue equipment to be transferred, before allowances for depreciation, is represented as (a) 15 truck tractors (5 have a $17,000 unpaid balance due thereon, payable $900 monthly under terms of a conditional sales contract), $125,510, (b) 35 trailers, $84,453, (c) 12 delivery trucks, $32,012, (d) miscellaneous equipment, $2,626, (e) service cars, $4,040, and (f) garage equipment, $2,778, or a total of $251,419.

Under terms of the aforementioned agreement to sell, the vendor's accounts receivable, cash bonds or deposits, prepaid insurance, and fees are to be assigned to the vendee subject to all accounts payable which vendee agrees to assume and pay. The certificate, motor vehicles, and other property to be transferred are represented as merchantable, free and clear of all liens except those appearing in vendor's balance sheet which liabilities vendee is to assume and pay. The transfer of property with

the necessary execution of instruments is to become effective as of the last day of the month following approval of the transfer by the Commission or other regulatory authority. If the application is granted, even though vendor retains the principal stock ownership in vendee, the vendor expects to retire, because of ill health since 1962, from active participation in the trucking business. Donald L. Washum expects to continue as manager and president of vendee. All personnel of the vendor is to be retained under the proposal and, in addition, a safety engineer and a traffic manager are expected to be employed. The same terminals and facilities there are expected to be used.

[104 M. C. C. 843] Operations of vendor and vendee, in many respects, are closely related. Vendee's president is the son and only child of vendor. The joint headquarters of both is maintained at Yuma in the same building. Both use the same dock and shop facilities there. The father and son occupy the same double desk and office when conducting their respective operations. Since 1962, vendor has been in ill health, as noted, and his son has authority to sign vendor's checks in emergencies. The son also sometimes handles transportation business for his father. Vendor's office manager usually signs checks of that carrier. Two tractors and five trailers leased by vendor to vendee are maintained at Yuma by three mechanics employed by the vendor. Other equipment used by the vendee is maintained at Yuma by one mechanic which vendee employs there. Both have pickup and delivery equipment in operation in the Yuma area. The equipment there is used interchangeably for transportation of both vendor's or vendee's traffic depending upon operating convenience. Interline bills are never cut in connection with the rendering of such pickup and delivery service. A teletype system in operation between Los Angeles, Yuma, and Phoenix is used by both. A joint insurance

policy is maintained by both and premiums are prorated on a mileage basis. Since 1957, they have maintained joint-through rates published in Interstate Freight Carrier's Conference tariffs covering movements between Los Angeles and Phoenix and various intermediate and off-route points. Health, welfare, and pension funds payments to labor unions are paid by vendor who receives a refund on a prorated basis from vendee. Separate payrolls are maintained by the carriers. Drivers are used interchangeably by both and are transferred from the payroll of one to the other. Both vendee and vendor solicit interline traffic for movement over their lines between Los Angeles and Phoenix and intermediate and off-route points. On May 3, 1963, an application signed by vendor was filed with the Arizona Corporation Commission requesting renewal of certificate No. 5541 of H. L. Washum and Donald L. Washum, doing business as H. L. Washum & Son. Nevertheless, vendor represents that his son has never held any interest in H. L. Washum & Son. Vendee further represents that he has never been a director of vendee, that he has not issued orders to vendee, that he has never taken suggestions from vendee, and that the traffic which vendor interlines with vendee is no different than that of other interline carriers. Also on July 12, 1964, Donald L. Washum addressed a letter to a Los Angeles law firm relative to an inquiry respecting the possible purchase of involved operating rights which in part is as follows:

> We have a combination of companies which is now serving points between Los Angeles and Phoenix, Arizona. This consists of "Washum Bros.," a cattle company, "Los Angeles Yuma Freight Lines" and "Svensson Freight Lines." LA-Yuma has two California Intrastate Permits and its I. C. C. Permit serving LA to Yuma and all intermediate points including Calexico, California. Svensson is an intrastate carrier with ICC Registrations serving points between Yuma and Phoenix.

Protestants are general commodity motor common carrier competitors of vendor and vendee. Seven hold authority to provide service between Los Angeles and Phoenix over routes through El Centro and Wickenburg. Four [104 M. C. C. 844] operate over the involved routes between Los Angeles and Phoenix, through Yuma, El Centro, and Indio. Three are authorized to serve all intermediate points and certain off-route points along the routes, and two hold more limited intermediate and off-route point authority. One holds authority to operate between Yuma and Phoenix with service at all intermediate points. Generally, these carriers perform overnight daily scheduled service 5 days each week over the described routes between Phoenix and Los Angeles, between Yuma and Phoenix, and between Yuma and Los Angeles. At least one of them provides a scheduled service between those points 6 days each week. They oppose the application because authorization of the proposal would authorize a new single-line competitive service, because the operations of vendee over the involved routes are of doubtful authenticity, and because they believe applicants operations are being conducted by vendor and vendee under common control in a common interest in violation of section 5(4) of the act. In the event that vendee's certificate of registration is terminated and its Sub-No. 2 application denied in the proceedings assigned to the joint board relating hereto, they have no objection, under section 212(b) of the act, to authorization of transfer of vendor's certificate to Svensson Freight Lines, an Arizona intrastate carrier.

Discussion and conclusions.—The vendor and vendee may, under section 5 of the act, seek the Commission's approval of the purchase and merger of the motor carrier certificate and properties of the former into the latter. They have filed such an application. As noted, the interstate operating authority of the vendee consists of a cer-

tificate of registration. Such a certificate, under section 206(a)(6) and (7) of the act, is valid only so long as the holder is engaged in operations solely within a single State and is not controlled by, controlling, or under common control with a multiple-State carrier. Compare *T. I. M. E. Freight, Inc.—Merger*, 97 M. C. C. 310, 323. If, upon consideration of evidence presented in the application, the proposal is found consistent with the public interest, an order approving it could be entered, and the transaction consummated. However, in such event, the vendee, holding multiple-State authority, would be ineligible under provisions of section 206(a) to operate under its certificate of registration. An alternate course is provided in section 207 of the act for the issuance of a certificate to any qualified applicant therefor, if there is a finding, among other things, that the proposed service is or will be required by the present and future convenience and necessity. An application to enable such finding, No. MC-96784 (Sub-No. 2) requesting commodity and territorial authority somewhat similar in scope to that contained in the certificate of registration, is presently the subject of a recommended joint board report served concurrently herewith. The board therein recommends denial of the application. Therefore, if this recommendation is sustained, an authorization of the considered section 5 proposal would be inappropriate and without statutory jurisdictional support.

Presented here, for consideration with the above circumstance, is the issue of common control by Haywood Washum and his son, Donald L. Washum, of the applicants' operations. This issue is the subject of determination by the joint board in the No. MC-A 3262 complaints proceeding. The board, in its report in that proceeding served concurrently herewith, among other things, found that Haywood Washum and Don Washum have exercised continuously since July 1957, control and

management in a common interest of operations of [104 M. C. C. 845] vendor (a multiple-State carrier) with the operations of vendee (a single-State motor common carrier operating under a certificate of registration) in violation of section 5(4) of the act. This finding raises the question of whether such unauthorized control, which might warrant enforcement action by the Commission, bars authorization of the proposal. Such control does not bar such authorization and the issuance of a certificate of convenience and necessity if a public need for its continuance exists. See *Victory Coach Lines, Inc.—Pur.—Indiana Motor Bus Co.*, 45 M. C. C. 575, 586. However, there is no showing here that the volume of traffic available for movement between the involved points, or the evidence of need, are sufficient to support the single-line service which vendee expects to render, particularly in face of the abundant service provided by the protesting carriers. Moreover, there is some indication here that perpetuation of the vendee's past operations by authorization of the proposal will impair protestants' ability to render adequate future service between the involved points. The finding of the board respecting unauthorized common control and management of the applicants' operations is amply supported by the evidence. These conclusions afford reasonable justification for a denial of the application. Further consideration of other issues raised by the application, therefore, becomes unnecessary.

ULTIMATE FINDINGS AND ORDER

Upon all the evidence of record, the examiner finds that the transaction has not been shown to be consistent with the public interest, and that the application, accordingly should be denied.

APPENDIX A

Certificate of Public Convenience and Necessity

No. MC-14045

HAYWOOD WASHUM, DOING BUSINESS AS LOS ANGELES-YUMA FREIGHT LINES, YUMA, ARIZONA

Regular routes:

General commodities, except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, and commodities requiring special equipment,

Between Los Angeles, Calif., and Yuma, Ariz., serving all intermediate points, and the off route points of Calexico, Calif., points in the Los Angeles and Los Angeles Harbor, Calif., Commercial Zones, as defined by the Commission and those in that part of California bounded by a line beginning at the eastern boundary of the Los Angeles, Calif., Commercial Zone, and extending easterly along U. S. Highway 66 to San Bernardino, Calif., thence along California Highway 18 to Corona, Calif., thence along U. S. Highway 91 to junction California Highway 18 (formerly portion U. S. Highway 91), thence along California Highway 18 through Olive, Calif., [104 M. C. C. 846] to junction U. S. Highway 101, thence along U. S. Highway 101 to junction California Highway 55, thence along California Highway 55 to junction Alternate U. S. Highway 101 to the eastern boundary of the Los Angeles Harbor, Calif., Commercial Zone, and thence along the eastern boundaries of the Los Angeles and Los Angeles Harbor, Calif., Commercial Zones to the point of beginning, including points on the indicated portions of the highways specified.

From Los Angeles over U. S. Highway 99 to El Centro, Calif., thence over U. S. Highway 80 to Yuma, and return over the same route.

Irregular Routes:

General Commodities, except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, and commodities requiring special equipment,

Between Yuma, Ariz., on the one hand, and, on the other, points in Arizona within 30 miles of Yuma.

APPENDIX B

Certificate of Registration

No. MC 96784 (Sub-No. 1)

(This certificate of registration supersedes the notice of intent to engage in transportation in interstate or foreign commerce on file in No. MC 96784.)

SVENSSON FREIGHT LINES, A CORPORATION, YUMA, ARIZONA

APPENDIX CONTAINING SCOPE OF AUTHORITY

Description of the transportation service authorized to be conducted solely within the State of Arizona, in intrastate commerce, as a common carrier by motor vehicle, pursuant to Certificate of Convenience and Necessity No. 3857, dated August 8, 1962, issued by the Arizona Corporation Commission:[1]

[1] Arizona Certificate No. 3857, dated August 8, 1962, is now conditioned to expire on December 31, 1971. If such certificate is renewed or reissued, a copy of each renewal order, duly certified by an appropriate official of the State Commission shall be filed by the holder thereof with the Interstate Commerce Commission in Washington, D. C., within 30 days after the date of service of the renewal order. The holder hereof is cautioned that if the Arizona Corporation Commission does not renew the intrastate

(1) Freight between Yuma and Roll serving Wellton, Arizona.

(2) GENERAL COMMODITIES over U. S. Highway 80, between Roll, Arizona and the area generally known as the Mohawk Valley or more particularly [104 M. C. C. 847] defined as that area embraced by a line beginning at the Western boundary of Range 17 West, at the north line of township 9 South; extending North to the South line of Township 6 South; thence East to the West boundary of Range 12 West; thence South to the North boundary of Township 9 South; thence West to the point of beginning and Phoenix, Arizona, and return, except that no service may be rendered between Phoenix and Yuma and intermediate points on U. S. Highway 80 except that on truckload lots a split delivery may be made when a portion of the load is destined to points in Roll and the Mohawk Valley area and the balance of the load at Yuma. Freight between Yuma and Hyder and a radius of 25 miles thereof of Hyder.

(3) SEED and GRAIN from the farms in the area now served by applicant to Phoenix, Arizona excepting farm products from Yuma, Arizona.

(4) SEED and GRAIN from the warehouse of carrier in Wellton, Arizona to Phoenix, Arizona.

(5) GENERAL COMMODITIES, EXPRESS & FREIGHT as a line haul carrier between Yuma Test Station and San Luis, Arizona, serving all intermedi

operating rights embraced in Certificate No. 887, or when renewed, if a certified copy of each renewal order is not filed with this Commission as required above, his right to engage in interstate or foreign commerce, as evidenced by a Certificate of Registration issued in this proceeding, shall terminate on the 180th day after the expiration date of the intrastate rights covered by the last order of the Arizona Corporation Commission properly on file with this Commission."

ate points on Arizona State Highway 95, limited to commodities originating from or destined to points and places outside of the area requested. RESTRICTION: No shipments shall be transported which originate and terminate on State Highway 95, and excluding from the rights granted herein on State Highway 95, liquids in bulk in tank truck vehicles, machinery and construction materials in excess of 2000 pounds per shipment household goods and Class "A" and "B" explosives.

The statement of facts, conclusions, and findings of Joint Board No. 47[1] in No. MC-C-5262 follows:

Consolidated Copperstate Lines (Consolidated Copperstate), Consolidated Freightways Corporation of Delaware (Freightways), Hopper Truck Lines (Hopper), Lee Way Motor Freight, Inc. (Lee Way), Milne Truck Lines, Inc. (Milne), Navajo Freight Lines, Inc. (Navajo), Pacific Motor Trucking Company (PMT), T. I. M. E. Freight, Inc. (T. I. M. E.), Thunderbird Freight Lines, Inc. (Thunderbird) and Western Gillette, Inc. (Western Gillette), by Complaint filed August 12, 1966, allege that defendants Haywood Washum, an individual doing business as Los Angeles-Yuma Freight Lines (LAY), Svensson Freight Lines, a corporation (Svensson), and Don Washum are regularly and frequently engaged in motor common carrier operations between Los Angeles, Calif., and Phoenix, Ariz., without first having obtained appropriate operating authority from the Commission authorizing such service, all in violation of section 206, and subdivisions thereof, of the Interstate Commerce Act (act). The complainants further allege that the defendants Haywood Washum and

[1] The State of California has waived its right to participate in this proceeding, as the joint board member from that State failed to appear at the hearing.

Don Washum, and each of them, have exercised for a period of at least 2 years last past, and continue to exercise, control and management in the common interest of the operations of LAY with the operations of the defendant Svensson, all in violation of sec- [104 M. C. C. 848] tion 5(4) of the act. Also, the complainants assert that by reason of the alleged common control and management of defendants Haywood Washum and Don Washum, and each of them, over the multi-State operations of Haywood Washum conducted pursuant to the certificate of public convenience and necessity issued to him under Section 207 of the act, and the single-State operations of the defendant Svensson continuing over a period of at least 2 years last past from the date of filing of the complaint, that the certificate of registration of Svensson has been terminated under the provisions of section 206(a)(6) and (7) of the act. Complainants pray that the Commission issue its order (A) declaring that the certificate of registration of Svensson has been terminated by operation of law under the provisions of section 206(a)(6) and (7) of the act; (B) ordering and directing the defendants, and each of them, to cease and desist from operating in interstate or foreign commerce between Yuma and Phoenix, Ariz., as a motor common carrier without first having obtained from this Commission a certificate of public convenience and necessity authorizing such operations pursuant to section 207 of the act; and (C) ordering and directing the defendants Haywood Washum and Don Washum, and each of them, to cease and desist from all control or management, whether directly or indirectly, in the common interest of the operations of the defendants Svensson and LAY.

By application filed in docket No. MC-F-9618 (Finance Proceeding), Svensson seeks an order authorizing it to purchase the operating rights and properties of LAY. By application filed December 20, 1966, in docket No. MC-96784 (Sub No. 2), (Certificate Proceeding) Svensson seeks

a certificate of public convenience and necessity from the Commission authorizing it to transport general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, and commodities requiring special equipment), (a) between Phoenix and Yuma, Ariz., over U. S. Highway 80 (with service authorized to or from all intermediate points between Theba and Yuma, Ariz., including Theba and Yuma, and off-route points of Roll, Dome, Hyder, and Agua Caliente, Ariz.); and (b) between Yuma Test Station and San Luis, Ariz., over U. S. Highway 95 (with service authorized to or from all intermediate points).

The Complaint and Certificate Proceedings were assigned to Joint Board No. 47 and the Finance Proceeding to Examiner Samuel C. Shoup for hearing and the recommendation of appropriate orders thereon. All of the proceedings were heard on a consolidated record before Joint Board No. 47 and Examiner Samuel C. Shoup on May 8 to May 11, 1967. The Finance and Certificate Proceedings will be the subject of a separate report or reports.

STATEMENT OF FACTS

Svensson Freight Lines, an Arizona corporation, has been engaged as a motor common carrier in Arizona intrastate commerce, and interstate and foreign commerce, continuously for a period of years dating back prior to 1957. Until the amendment to section 206(a)(6) and (7) of the act, effective October 15, 1962, it conducted such operations under the exemption established in section 206(a)(6) of the act, and since June 5, 1963, it has conducted interstate and foreign operations under a certificate of registration issued to it in docket No. MC 96784 (Sub No. 1), pursuant to the provisions of section 206(a)(6) and (7) of the act.

[104 M.C.C. 849] In June or July 1957, the defendant Don Washum and his cousin James Eldrice Washum each

purchased 50 per cent of all of the issued and outstanding stock of the defendant Svensson from its previous shareholder Guss Svensson. Funds were borrowed from the First National Bank of Yuma to meet the down payment required by Guss Svensson to discharge certain pressing obligations of Svensson. The note issued by James Eldree Washum and Don Washum to the First National Bank of Yuma was consigned by the defendant Haywood Washum, father of the defendant Don Washum.

The defendant Haywood Washum and his brother Jim Washum were copartners doing business as Los Angeles-Yuma Freight Lines. They purchased a certificate of public convenience and necessity issued in docket No. MC 14045 from one James M. Flint, which purchase was consummated on October 1, 1956. Jim Washum is the father of James Eldree Washum. On January 22, 1963, Jim Washum transferred all of his interest in Los Angeles-Yuma Freight Lines to Haywood Washum and since that date Haywood Washum has held the certificate issued in docket No. MC 14045 as a sole proprietor. At about the same time that defendant Haywood Washum, acquired the interest of his brother in LAY, the defendant, Don Washum, acquired the stock interest of his cousin James Eldree Washum in Svensson. Thus, since on or about January 21, 1963, the certificate of LAY has been held by Haywood Washum as a sole proprietor and all of the issued and outstanding stock of Svensson has been held by his son Don Washum. Defendant Don Washum was a vice president of Svensson continuously from June or July 1957 to on or about January 21, 1963, when he became president of the corporation upon acquiring the interest of his cousin. He has continued to be president of Svensson since on or about January 21, 1963.

The LAY certificate issued in docket No. MC 14045, attached hereto as "appendix A," authorizes the transpor

tation of general commodities, with specified exceptions, between Los Angeles, Calif., and Yuma, Ariz., including certain intermediate and off-route points. The Svensson certificate of registration, attached hereto as "appendix B", authorized the transportation of general commodities between various points and places in the State of Arizona. Included within its operating authority is authority to transport truckload lots from Phoenix to Yuma, Ariz., when a portion of the load is destined to points in Roll and the Mohawk Valley area, as described in the certificate of registration. The Mohawk Valley area and Roll are located between Phoenix and Yuma, Ariz.

Since July 1957, the defendant, Svensson, has provided a continuous and regular service in the transportation of general commodities in interstate or foreign commerce between Yuma and Phoenix, Ariz., in both directions. This traffic has been handled almost exclusively in interline service with LAY. Traffic handled in interline service between Svensson and LAY has consisted predominately of traffic originating at or destined to Los Angeles, Calif. This has resulted in a joint line service between Phoenix, Ariz., and Los Angeles, Calif.

Since July 1957, both LAY and Svensson have utilized a joint terminal at Yuma, Ariz., for the conduct of their operations. The terminal of LAY in Los Angeles, Calif., has been utilized by it exclusively in its own operations. Svensson has continuously maintained a terminal in Phoenix, Ariz., since [104 M. C. C. 850] at least July 1957. The present joint Yuma terminal of defendant Svensson and LAY is owned by Haywood Washum and his wife though prior to 1963 Haywood Washum and his wife owned the property jointly with Jim Washum and his wife.

Both Svensson and LAY maintain a telephone listing in the Phoenix Metropolitan Classified Telephone Directory which is the same number. Svensson and LAY main-

tain different telephone listings in the Yuma-Winterhaven-Somerton Classified Telephone Directory, but that said directory shows the Svensson telephone number as the one to be called in Phoenix, Ariz. (sic) to reach LAY and H. L. Washum & Son. H. L. Washum & Son is a carrier engaged in the transportation of cattle in Arizona intrastate commerce pursuant to a certificate issued to it by the Arizona Corporation Commission. A certified application for renewal of the certificate filed by Haywood Washum with the Arizona Corporation Commission on May 2, 1963, reflects that the operation is a copartnership consisting of H. L. Washum and Donald L. Washum (defendants herein).

From 1957 to the date of hearing on the Complaint herein, Svensson has conducted its operations, in part, with motor vehicle equipment leased from LAY. Where there has been sufficient traffic, through trailers owned by LAY have been utilized between Phoenix, Ariz., and Los Angeles, Calif., to provide through service, otherwise the traffic has been rehandled at the Yuma joint terminal facility. Ninety-five percent of the traffic interlined by LAY at Yuma, Ariz., has been with Svensson, and pickups and deliveries have been and are made in the Yuma area interchangeably with the pickup and delivery equipment of each depending upon their respective operating convenience. Svensson and LAY have maintained a single teletype system between Phoenix, Ariz., and Los Angeles, Calif., with teletype facilities also at Yuma, Ariz., in their joint terminal. At all times since August 26, 1957, the defendants Svensson and LAY (including the prior partnership of Haywood Washum and Jim Washum) have maintained a master policy of insurance covering the operations of Svensson, LAY, and H. L. Washum & Son (including the predecessor partnership Washum Brothers). Don Washum and his father Haywood Washum have utilized one desk at Yuma, Ariz., for the conduct of the oper-

ations of Svensson and LAY though each have separately employed office and dock personnel. Since approximately 1957 Svensson and LAY have maintained joint through rates in the tariffs of the Interstate Freight Carriers' Conference on traffic moving between Los Angeles, Calif., and Phoenix, Ariz., and various intermediate and off-route points. Also, both Svensson and LAY, for a number of years, have utilized common shop facilities at their joint terminal in Yuma, Ariz.

On February 4, 1963, the defendant Svensson filed a BOR 99 Application with the Commission, verified by the defendant Don Washum, as its president, for a "grandfather" certificate or registration in docket No. MC 96784 (Sub No. 1). The appendix "A" to the BOR 99 Application listed one Verlan Lee as vice president of Svensson. Verlan Lee now serves as the dock foreman of LAY though he continues to be the vice president of Svensson.

On January 12, 1964, the defendant Don Washum addressed a letter to a Los Angeles law firm offering to dispose of the Svensson and LAY operations and operating properties. The letter is on the stationery of Washum Brothers [104 M. C. C. 851] and Los Angeles-Yuma Freight Lines. The second paragraph thereof is particularly pertinent to the within-Complaint Proceeding. It reads as follows:

> "We have a combination of companies which is now serving points between Los Angeles and Phoenix, Ariz. This consists of 'Washum Bros.' a cattle company, 'Los Angeles-Yuma Freight Lines' and 'Svensson Freight Lines.' LA Yuma has two California Intrastate Permits and its ICC Permit serving LA to Yuma and all intermediate points including Calexico, California. Svensson is an intrastate carrier with ICC Registrations serving points between Yuma & Phoenix."

858] motor vehicle, pursuant to Certificate of Convenience and Necessity No. 3857, dated August 8, 1962, issued by the Arizona Corporation Commission:[1]

(1) FREIGHT between Yuma and Roll serving Wellton, Arizona.

(2) GENERAL COMMODITIES over U. S. Highway 80, between Roll, Arizona and the area generally known as the Mohawk Valley or more particularly defined as that area embraced by a line beginning at the Western boundary of Range 17 West, at the north line of township 9 south; extending North to the South line of Township 6 South; thence East to the West boundary of Range 12 West; thence South to the North boundary of Township 9 South; thence West to the point of beginning and Phoenix, Arizona, and return, except that no service may be rendered between Phoenix and Yuma and intermediate points on U. S. Highway 80 except that on truckload lots a split delivery may be made when a portion of the load is destined to points in Roll and the Mohawk Valley area and the balance of the load at Yuma. Freight between Yuma and Hyder and a radius of 25 miles thereof of Hyder.

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[1] Arizona Certificate No. 3857, dated August 8, 1962, is now conditioned to expire on December 31, 1971. If such certificate is renewed or reissued, a copy of each renewal order, duly certified by an appropriate official of the State Commission shall be filed by the holder thereof with the Interstate Commerce Commission in Washington, D. C., within 30 days after the date of service of the renewal order. The holder hereof is cautioned that if the Arizona Corporation Commission does not renew the intrastate operating rights embraced in certificate No. 3857, or when renewed, if a certified copy of each renewal order is not filed with this Commission as required above, his right to engage in interstate or foreign commerce, as evidenced by a Certificate of Registration issued in this proceeding, shall terminate on the 180th day after the expiration date of the intrastate rights covered by the last order of the Arizona Corporation Commission properly on file with this Commission.

(3) SEED and GRAIN from the farms in the area now served by applicant to Phoenix, Arizona excepting farm products from Yuma, Arizona.

(4) SEED and GRAIN from the warehouse of carrier in Wellton, Arizona to Phoenix, Arizona.

(5) GENERAL COMMODITIES, EXPRESS & FREIGHT as a line haul carrier between Yuma Test Station and San Luis, Arizona, serving all intermediate points on Arizona State Highway 95, limited to commodities originating from or destined to points and places outside of the area requested. RESTRICTION: No shipments shall be transported which originate and terminate on State Highway 95, and excluding from the rights granted herein on State Highway 95, liquids in bulk in tank truck vehicles, machinery and construction materials in excess of 2000 pounds per shipment household goods and Class "A" and "B" explosives.

The statement of facts, conclusions and findings of Joint Board No. 47[2] in No. MC-96784 (Sub-No. 2) follows:

[104 M. C. C. 859] By application filed December 20, 1966, Svensson Freight Lines, a corporation of Yuma, Ariz., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular routes, of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, and commodities requiring special equipment), (a) between Phoenix, Ariz., and Yuma, Ariz., over U. S. Highway 80 (service is authorized to or from

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[2] The State of California has waived its right to participate in this proceeding, as the joint board member from that State failed to appear at the hearing.

all intermediate points between Theba, Ariz., and Yuma, Ariz., including Theba and Yuma, and off-route points of Roll, Dome, Hyder, and Agua Caliente, Ariz.), and (b) between Yuma Test Station, Ariz., and San Luis, Ariz., over U. S. Highway 95 (service is authorized to or from all intermediate points).

The application was referred to Joint Board No. 47 for hearing and the recommendation of an appropriate order thereon. Hearing was held on a consolidated record with two related matters, Nos. MC-F-9618 and MC-C-5262, described in footnote 1 above, on May 8 through 11, 1967, at Phoenix, Ariz. No. MC-C-5262 was assigned for hearing before Joint Board No. 47, and No. MC-F-9618 before an examiner. Separate reports will be served in each of the proceedings. Consolidated Copperstate Lines, Hopper Truck Lines, Lee Way Motor Freight, Inc., Milne Truck Lines, Inc., Navajo Freight Lines, Inc., Pacific Motor Trucking Co., Thunderbird Freight Lines, Inc., T. I. M. E. Freight, Inc., and Western Gillette, Inc., oppose the application. Protestants are hereinafter referred to by appropriate short titles. Lee Way presented no evidence.

Applicant, a motor common carrier owned entirely by Donald L. Washum, holds a certificate of registration dated June 10, 1964, containing authority somewhat similar to that requested in the instant application. It was derived from an intrastate Arizona certificate of convenience and necessity, No. 3857, dated August 8, 1962, registered, in No. MC-96784, with the Commission under section 206 (a) of the Interstate Commerce Act, and latter converted to a certificate of registration, No. MC-96784 (Sub-No. 1), pursuant to the October 15, 1962, amendment to that section. The certificate of registration authorizes interstate or foreign transportation of:

(1) Freight between Yuma and Roll serving Wellton, Ariz.

(2) General commodities over U. S. Highway 80, between Roll, Ariz., and the area generally known as the Mohawk Valley or more particularly defined as that area embraced by a line beginning at the Western boundary of Range 17 West, at the north line of township 9 South; extending North to the South line of Township 6 South; thence East to the West boundary of Range 12 West; thence South to the North boundary of Township 9 South; thence West to the point of beginning and Phoenix, Ariz., and return, except that no service may be rendered between Phoenix and Yuma and intermediate points on U. S. Highway 80 except that on truckload lots a split delivery may be made when a portion of the load is destined to points in Roll and the Mohawk Valley area and the balance of the load at Yuma. Freight between Yuma and Hyder and a radius of 25 miles thereof of Hyder.

(3) Seed and grain from the farms in the area now served by applicant to Phoenix, Ariz., excepting farm products from Yuma, Ariz.

[104 M. C. C. 860] (4) Seed and grain from the warehouse of carrier in Wellton, Ariz., to Phoenix, Ariz.

(5) General commodities, express and freight as a line-haul carrier between Yuma Test Station and San Luis, Ariz., serving all intermediate points on Arizona State Highway 95, limited to points and places outside of the area requested.

Restriction: No shipments shall be transported which originate and terminate on State Highway 95, and excluding from the rights granted herein on State Highway 95, liquids in bulk in tank truck vehicles, machinery and construction materials in excess of 2000 pounds per shipment household goods and classes "A" and "B" explosives.

The described certificate under provisions of section 206 (a) of the act is valid only so long as the holder is

a carrier engaged in operation in a single State not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, so long as the corresponding State certificate is not terminated, suspended, restricted in scope, or transferred apart from the interstate or foreign rights. Applicant has performed interstate or foreign service under the authority between Yuma and Phoenix, and between Phoenix and San Luis, in which a portion of each truckload was represented as picked up or delivered at Roll or a Mohawk Valley point.

Two abstracts, an original and a supplement, revealing some 2,569 shipments, principally less-than-truckload, transported by applicant from March 1, 1966, through March 31, 1967, from and to involved points such as Yuma, Phoenix and vicinity, Los Angeles and vicinity, and those in Imperial County, Calif., are in evidence. Copies of applicant's freight bills were produced at the hearing to support the abstracts, but dispatch sheets which might have shown drops in transit were not made available, and pertinent information respecting partial deliveries en route could not be ascertained from the freight bills. The abstracts were prepared from 8 to 10 freight bills selected at random for each day of operation to show continuous service between Phoenix and Yuma. They reveal the date of shipment, applicant's bill number, the interstate carrier's bill number (in this instance Los Angeles-Yuma Freight Lines hereinafter called LA-Yuma), the weight, and the interline point, Yuma. Each shipment shown has a different consignee and a different consignor and each was handled as an individual shipment.

Applicant expresses some uncertainty as to the authorized scope of authority set forth in its certificate of registration even though in the past, apparently, it has been the subject of certain undisclosed interpretative Arizona litigation. It presented no evidence to show the Arizona

interpretation, if any, of its certificate of registration. Applicant maintains a Yuma terminal used jointly by it and LA-Yuma. The latter, a motor common carrier operating between Los Angeles and Yuma, with whom applicant interlines freight, is owned by Haywood Washum, father of Donald L. Washum. Applicant owns and operates 2 tractors, 11 pickup trucks, and 5 trailers, and leases 2 tractors and 5 trailers from LA-Yuma, all used in its transportation business. It employs one mechanic at Yuma who maintains equipment of applicant at that point.

Applicant's financial statement, as of December 31, 1966, shows assets, $108,972, including current assets, $23,936, fixed assets, $82,626, and other [104 M. C. C. 861] assets, $2,410, and liabilities including current liabilities, $51,662 (including among other items, $12,126 owed to Donald L. Washum and $2,500 equipment obligations due within 1 year), deferred liabilities, $4,543, capital stock, $43,000, and earned surplus $9,767. Its profit and loss statement for 1966 shows net profit from operation, $1,653.

SHIPPER'S EVIDENCE

A customs broker with offices and warehouse facilities at San Luis, Ariz., and Calexico, Calif., handles customs clearances, advises, and arranges transportation for about 100 Mexicans and an undisclosed number of persons at Calexico. He receives all types of merchandise moving from or through Phoenix, Ariz., to San Luis and Calexico into Mexico, and also receives shipments moving from Mexico into the United States. If the persons served have no transportation for crossing the international boundary lines at San Luis or Calexico he provides licensed trucks for that purpose. Most of his traffic moves across the boundary line in truck equipment of the consignees or consignors. The broker receives daily shipments totaling about 10,000 pounds which move from Phoenix to San Luis. He routes more than 50 percent of this traffic and

uses applicant principally for such movements because of its daily morning delivery service at San Luis enabling sameday boundary crossings. The broker is aware that Western Gillette provides daily service 5 days each week between San Luis and Phoenix, with afternoon deliveries at San Luis, and the service of that carrier is used daily out of San Luis. The broker makes no complaint respecting this carrier's service, but says applicant renders a better service. The specific amount of traffic handled by the broker involving movements to or from points beyond Arizona, other than in private carriage, is undisclosed.

A San Luis, Sonora, Mexico, well driller each month receives about three shipments of drilling mud and pipe from Phoenix which are transported by applicant to San Luis. The broker usually telephones the shipper upon arrival of shipments at San Luis, and 90 percent of the shipments are picked up by the shipper in his own trucks. In other instances, delivery is effected in the broker's trucks, for which a handling charge is made. The shipper expresses need for daily expedited transportation which applicant has provided from Phoenix and indicates he would continue using applicant's service if the application is granted. The shipper presently uses Western Gillette for movements from Los Angeles, where most of his traffic originates, to San Luis. The shipper uses none of this carrier's service for movements from Phoenix to San Luis.

A citrus farm management company at Tacna, Ariz., 42 miles east of Yuma in the Mohawk Valley area, receives an average of three shipments of commodities used in farming, each week, which originate at points in California. About 3 percent of its inbound traffic originates in Eastern States and is not controlled by the management company. The shipments from California are transported to Yuma by Los Angeles-Yuma Freight Line and

there interlined with applicant for movement beyond to Tacna. The management company receives good transportation service from applicant and has no transportation complaints. The shipper represents that if it could obtain overnight service [104 M. C. C. 862] from Los Angeles, which service presently is not available, it could reduce its inventory of commodities required for farming about 33 percent.

Bruce Church Ranch, among other things, grows citrus and grapes at its White Wing Ranch, about 12 miles north of Dateland, Ariz., a point on U. S. Highway 80. Each week the ranch receives about three average 1,000-pound shipments of commodities used in its growing operation at the named ranch. The shipments originate principally at Los Angeles, Calif., and move by Los Angeles-Yuma to Yuma where they are interlined with the applicant for movement to distination. Shipments which originate on the lines of other carriers are also interlined with applicant at Yuma. The shipper is satisfied with its existing service, but nevertheless expresses need for single-line under applicant's proposed purchase of Los Angeles-Yuma and therefore supports the instant application. The ranch representative was uncertain as to the exact location of White Wing Ranch and whether transportation to the ranch is within the scope of the application cannot be determined from the evidence.

A salesman for Gotham Industries sells promotional plastic housewares to wholesale and retail establishments in the Phoenix area which commodities are shipped from Los Angeles to Phoenix, principally by LA-Yuma to Yuma and there interlined with applicant for delivery in Phoenix. Each week about three shipments, with an average value of $5,500, move from and to the described points. An expedited service, including Saturday service, is required by the shipper. During the year immediately preceding the hearing, about 70 percent of the shipments

have moved by the described carriers and 30 percent by Milne. That service has been satisfactory and the salesman supports the application because he desires the described service to continue. The shipper is aware there are at least nine other motor carriers rendering service between the described points whose services, if used, might be satisfactory. The salesman prefers the services of carriers he presently uses.

Circle K Tire Company of Phoenix, Ariz., ships tires several times each week from Phoenix to Imperial County and Los Angeles, Calif., area points, and from a Los Angeles warehouse to Phoenix. The shipments range in weight from 200 to 10,000 pounds. The shipper requires a 6-day weekly service and often needs expedited transportation. It has used most of the existing motor carriers, including interline service of Svensson and LA-Yuma, for the described transportation. It has used services of Svensson for about 18 years and supports the application because of excellent service which it has received from that carrier. It indicates it would continue using applicant's service from and to the proposed points if authorized. About one third of the shipper's involved traffic is presently being transported by Svensson.

Best Applicators of Arizona installs wallboard products and receives at Phoenix about two shipments of building materials such as wallboard, masonite, and adhesive from Ontario, Calif. The shipments range in weight from 600 to 2,000 pounds each. Some of the commodities are fragile and susceptible to damage in transit. The shipper requires a 24-hour origin-to-destination service with delivery on Saturday about once every 6 weeks. It has used applicant's interline service for movement of its commodities from and to the described points for about 5.5 months immediately prior to the hearing, and the service of Milne before that time. Service of the latter carrier generally has been satisfactory except that some damage

occurred in connection with shipments [104 M. C. C. 863] which it transported, that it delivers no shipments on Saturdays, and that it sometimes fails to provide a 24-hour service. If applicant could not provide the shipper required transportation, it indicates that it would use Milne or other existing carriers' services.

Reynolds Aluminum Supply Company of Phoenix is a wholesale distribution outlet for aluminum, steel, building, and industrial products. About once each month it ships some of these commodities from Phoenix to points in California, and about four times each week it ships these commodities from Los Angeles to Phoenix. About 75 tons of the steel and 25 tons of the aluminum commodities move each month from Los Angeles to Phoenix. The shipper requires expedited service and occasional Saturday deliveries when customers need commodities delivered on that day. About 90 percent of the involved traffic is moved by the connecting carrier services of LA-Yuma and Svensson, and the remaining 10 percent by Milne, Lee Way, and Western Gillette. This shipper would like to continue using applicant's services, but all the motor carrier transportation used by the shipper for movement of the described commodities has been satisfactory.

McGraw-Edison Company manufactures and distributes air coolers, generators, and parts of these commodities at Phoenix which are shipped daily to Calexico, Brawley, El Centro, or Sultan City, Calif. The shipper requires expedited transportation with Saturday deliveries once or twice each month. Thirty percent of the commodities are transported in the shipper's own truck equipment, and the balance by motor common carriers. One-half the remaining 70 percent is transported by applicant and its connecting carrier, through the Yuma gateway, and the balance is transported by Western Gillette, Lee Way, and Hopper. The shipper's private equipment moves its truckload traffic, and its less-than-truckload shipments are

tendered to other carriers. The common carrier service used by the shipper generally has been satisfactory for movement of large shipments but some delays have occurred in connection with the movement of some of its less-than-truckload shipments. While the joint-line service provided by Svensson and LA-Yuma has been satisfactory to the shipper, it nevertheless prefers the use of single-line service as proposed if the Svensson purchase of LA-Yuma is authorized.

C. H. Baker Shoe Store of Phoenix each week receives from Los Angeles about five shipments of shoes, shoe accessories, hosiery, bags, and polishes ranging in weight from 600 to 1,800 pounds each, and ships about three shipments of similar commodities from Phoenix to Los Angeles. It has used the joint-line services of Svensson and LA-Yuma exclusively during the 3 years preceding the hearing for the movement of those shipments. Prior thereto, Navajo transported its commodities but that carrier's service was too slow. The shipper is aware of other motor carriers which provide service between the described points but has requested none of their services because the carriers which it presently uses have been rendering satisfactory service.

PROTESTANTS' EVIDENCE

Navajo, a motor common carrier of general commodities operating over routes extending between California and Massachusetts, holds pertinent authority to operate over U. S. Highways 60 and 89, through Wickenburg, Ariz., [104 M. C. C. 864] between Los Angeles and Phoenix. It does not serve Yuma directly. It maintains terminals, among others, at Los Angeles and Phoenix, operates a large amount of truck equipment, and regularly provides general-commodity service at points on those routes. An abstract of shipments of the involved traffic transported by Navajo during a representative week of

April 17, 1967, reveals that it transported 163 shipments from the Los Angeles gateway point to Phoenix, and 133 shipments in the reverse direction. All except three of the shipments weighed less than 10,000 pounds each and the total weight of all the shipments was about 93.6 tons. Navajo opposes the application because of ample existing competitive motor carrier service between Phoenix and Los Angeles, and because of the competitive interline service provided by applicant which it believes to be of doubtful authenticity.

Western Gillette, a motor common carrier of general commodities over routes generally extending from Los Angeles to Chicago, as pertinent, operates over U. S. Highways 60 and 70, through Wickenburg, Ariz., over U. S. Highways 101 and 80, through San Diego, Calif., and Yuma, Ariz., and over U. S. Highways 60 and 80 and California Highway 86, through Indio and El Centro, Calif., between Los Angeles and Phoenix, serving off-route points within 10 miles of San Diego, and 25 miles of Yuma and Phoenix and many intermediate points along those routes. No service is authorized at intermediate points on U. S. Highway 80 between Yuma and Phoenix except those within 25 miles of both Phoenix and Yuma. This carrier also holds authority to transport general commodities, with certain exceptions, in truckloads of 10,000 pounds or more between points in Arizona on and south of U. S. Highway 66 and most of the involved California points. It maintains terminals at Los Angeles, Yuma, and Phoenix, and operates a large amount of truck equipment suitable for the involved transportation. At Los Angeles it operates 125 pickup and delivery vehicles, at Phoenix 67, and at Yuma 10. Overnight service, Monday through Friday of each week, is provided between Phoenix and Yuma. It serves the Yuma Test Station and San Luis daily. At San Luis its traffic is handled by the above-described supporting broker who employs only one per-

son there to receive freight. On a representative day, April 28, 1967, Western Gillette transported shipments weighing a total of about 117.8 tons from Phoenix to the Los Angeles commercial zone, shipments weighing about 45.6 tons from Yuma to the Los Angeles zone, shipments weighing about 124.3 tons from the Los Angeles zone to Phoenix, and shipments weighing about 5.5 tons from the Los Angeles zone to Yuma. During April 1967, it transported shipments weighing a total of about 37.7 tons from Phoenix to Yuma. Pickup and delivery service on Saturdays is provided only upon request of shippers because the cost of and demand for such service does not warrant a Saturday scheduled service. This carrier transports both less-than-truckload and truckload shipments, interlines freight with other motor carriers, and interchanges 27-foot trailers at El Centro, Calif., with Thompson Truck Line to provide service to and from the port of entry at Calexico, Calif., and Imperial County points. It opposes the application because its authorization in connection with the proposed purchase by applicant of LA-Yuma would establish a new single-line competitive service between Phoenix and Los Angeles, and would subject the substantial amount of traffic which this protestant transports between the involved points to diversion.

[104 M. C. C. 865] *Consolidated Copperstate* and its subsidiary Valley Motor Lines, a general-commodity motor carrier, operates over routes extending from Portland, Oreg., through California, Arizona (also from Salt Lake City through Arizona), New Mexico, and Texas, to Houston, Tex. It holds pertinent common carrier authority to transport general commodities, with usual exceptions, between Los Angeles and Phoenix, over U. S. Highway 70, serving all intermediate points and off-route points within 25 miles of the specified route, and also between those points over U. S. Highways 99 and 80, through Indio and El Centro, Calif., and Yuma and Gila Bend, Ariz., serving

all intermediate points. It maintains terminals at Los Angeles and Phoenix, and operates a large amount of truck equipment suitable for the involved transportation. It provides daily service between Los Angeles and Phoenix over U. S. Highway 70, and also between those points over U. S. Highways 99 and 80, but is unable to obtain sufficient traffic for movement over the latter route to warrant maintenance of a Yuma terminal and the rendering of direct service there. It now transports Yuma area traffic only to or from the Yuma Test Station which consists of explosives. It provides no direct service at intermediate points on U. S. Highway 80 between Yuma and Phoenix, except at Gila Bend. Shipments which it transports, destined to other points on the route, are interlined with Hopper. During February 1967, it transported 723 shipments (1,048.5 tons) from Phoenix to Los Angeles and 4,284 shipments (1,943 tons) in the reverse direction, and on May 2, 1967, it transported 53 shipments (25 tons) from Phoenix area points to Los Angeles area points, and 247 shipments (164.5 tons) in the reverse direction, all of which is representative of the involved traffic which it transports. It opposes the application because a grant of the requested authority would authorize a new competitive service, and because it is interested in obtaining additional traffic for movement to and from the involved points.

Thunderbird, a motor common carrier, holds authority to transport general commodities, with usual exceptions, between the Los Angeles and Los Angeles Harbor commercial zones and Phoenix over U. S. Highway 60, serving no intermediate points. It holds no authority to serve or operate through Yuma. It maintains terminals at Los Angeles and Phoenix, and operates 39 trucks, 70 tractors, and 132 trailers suitable for the proposed transportation. It provides daily service between Los Angeles and Phoenix, including a pickup and delivery service, 6 days each week, except that such service at Los Angeles on

Saturdays is provided only upon shippers' requests. It solicits and transports both truckload and less-than-truckload shipments. Representative of the traffic which it transports between the described points is that for January 5 and June 2, 1965 and 1966, and January 4, 1967, consisting of a total of 1,136 eastbound tons and 332 westbound tons. This carrier opposes the application because authorization of the requested authority in connection with approval of applicant's proposed purchase of LA-Yuma would authorize a new single-line Los Angeles-Phoenix competitive service. The carrier is ready to transport any traffic presently hauled by applicant which might be determined to be beyond the scope of its certificate of registration.

Milne, a motor common carrier, operates over routes generally extending through Colorado, New Mexico, Utah, and Arizona, and Southern California, Nevada, Idaho, and Wyoming. As pertinent, it holds authority to transport general commodities, with usual exceptions, between Phoenix and Los Angeles, through Indio, El Centro, and Yuma, over U. S. Highways 99 and 80, including [104 M. C. C. 866] service at intermediate points on U. S. Highway 80 in Arizona, points within 20 miles of Phoenix and within 10 miles of Yuma, and described Los Angeles Basin area points. It maintains terminals at Los Angeles and Phoenix, and operates 132 pickup and delivery trucks, 157 tractors, and 328 trailers suitable for the proposed transportation. It stations equipment at Los Angeles and Phoenix and provides pickup and delivery service at these points. It provides service between Los Angeles and Phoenix Monday and Friday of each week and Saturday upon request therefor. On April 13, 1967, it transported a shipment of aluminum extrusions from Los Angeles to Phoenix and Reynolds Aluminum Company. Also, on March 2, April 3 and 19, and May 3, 1967, it transported four less-than-truckload shipments for Best Applications

from Los Angeles to Phoenix. In each instance, the latter shipper was notified by telephone upon arrival of the shipment and it was picked up by the shipper. About 5 years prior to the hearing, its Yuma terminal was closed because sufficient traffic in that area to sustain the terminal was unavailable. It desires to reestablish that terminal. It indicates there is no need for the proposed service, and generally represents that applicant has established what it believes is an unauthorized competitive service from and to the involved points.

T. I. M. E., a motor common carrier of general commodities, operates over routes extending generally from San Francisco, through Los Angeles and Phoenix to Kansas City, Mo., Chicago, Ill., and Boston, Mass. As pertinent, it holds authority to transport general commodities between Los Angeles Basin area points and Phoenix, through Indio and Wickenburg, over U. S. Highways 99 and 70, and also through Indio, El Centro, and Yuma, over U. S. Highways 99 and 80, serving intermediate points. It performs a daily scheduled service over the Phoenix-Los Angeles route, through Wickenburg, and service upon request of shippers over the Phoenix-Los Angeles route through El Centro and Yuma. Traffic available to this carrier at points along the route through Yuma has been insufficient to warrant establishment of a Yuma terminal. T. I. M. E. maintains terminals at Los Angeles and Phoenix and operates a large amount of truck equipment suitable for the proposed transportation. It provides pickup and delivery service throughout the Phoenix and Los Angeles Basin areas Monday through Friday of each week, and service on Saturday upon request of shippers. No regular Saturday pickup and delivery service at those points is provided because the demand therefor and cost of such service are insufficient. A survey of shipments transported by the carrier from April 3 through 28, 1967, reveals a total movement of about 254.9 tons from Los

Angeles area points to Phoenix, and 21.8 tons in the reverse direction.

PMT, a wholly owned subsidiary of Southern Pacific Company, holds pertinent authority to transport general commodities, with usual exceptions, between Yuma and Phoenix, in interstate or foreign commerce, over U. S. Highway 80, serving all intermediate points and the off-route points of Roll, Jean, Tolleson, and Fowler, Ariz., restricted to pickup, delivery, and interchange of traffic only at points specified which are stations on the railroads, and subject to such future limitations imposed to insure service auxiliary to or supplemental of rail service. It also holds intrastate authority to operate between Phoenix and Yuma, including service at San Luis and Arizona Proving Grounds. No interstate authority is held to provide service between Los Angeles and Phoenix. It maintains terminals at Yuma and Phoenix, operates a large amount of truck equipment, and has provided service between those points for about 30 years. [104 M. C. C. 867] Pickup and delivery service is provided at those points 5 days each week, and Saturday service upon request therefor at Phoenix and 75 percent of the time at Yuma. Interlined freight is received from or delivered to other motor carriers at points along the described route. From April 3 through 28, 1967, it received 195 interstate shipments at Phoenix or Yuma which were delivered to Yuma and vicinity. Also, during the same time, it received 37 interstate shipments at Tucson which were delivered at Yuma or vicinity.

Hopper, a motor common carrier, holds pertinent authority to transport general commodities, except those of unusual value, dangerous explosives, household goods as defined by the Commission, commodities in bulk other than fruit and agricultural commodities, commodities requiring special equipment other than those requiring refrigeration

or specialized handling or rigging because of size or weight, and those injurious or contaminating to other lading, between Los Angeles and Phoenix, over U. S. Highways 99 and 80, through Indio, El Centro, and Yuma (also over U. S. Highways 99 and 60, through Indio and Wickenburg), serving intermediate points on those routes, off-route points in Arizona within 10 miles of the described routes, and off-route points within 15 miles of Truck Boulevard between Los Angeles and Los Angeles Harbor, Calif., with Yuma traffic restricted to that moving to or from points other than those in Imperial County, Calif., and with service between Los Angeles Harbor and Los Angeles restricted to traffic originating or destined to points east of Los Angeles on the described routes. No direct service is authorized at San Luis or Yuma Test Station. Hopper served the latter point for about 10 years under the mistaken belief that it held authority to serve that point. Service at the test station was discontinued by Hopper 2 days prior to the hearing. Hopper maintains terminals at Los Angeles, Yuma, and Phoenix, and operates 4 trucks, 28 tractors, and 97 trailers suitable for the proposed transportation. It provides overnight interstate scheduled service between Los Angeles and Phoenix, between Los Angeles and Yuma, and between Yuma and Phoenix. Forty pickup and delivery vehicles are maintained and operated in the Phoenix area and 50 in the Los Angeles area. Traffic studies by Hopper of the involved traffic reveals that during 1967, it transported a total of 13,910 interstate shipments (5,292.5 tons) from Los Angeles to Phoenix, 1,105 shipments (340 tons) from Los Angeles to Yuma, 1,360 shipments (1,228 tons) from Phoenix to Los Angeles, 211 shipments (667.5 tons) from Yuma to Los Angeles, and 301 shipments (59 tons) from Phoenix to Yuma. Pickup and delivery service is provided 6 days each week in the Phoenix area and 5 days each week at Yuma. Saturday service at Yuma and Los

Angeles is provided upon request therefor. Hopper represents that the application should be denied and applicant required to discontinue service along U. S. Highway 80 between Phoenix and Yuma, that in this event it will undertake to serve all intermediate and off-route points along that route within the scope of its operating authority, and that there is insufficient traffic moving to and from points along the route to justify such intermediate point service now. Both applicant and Western Gillette compete with Hopper for such traffic and Hopper transports about two shipments daily moving to or from points along the route. Hopper opposes the proposal because it believes no true conversion request is contained in the application, because applicant seeks authority other than that authorized in its certificate of registration, and because authorization of the proposal in connection with applicant's requested purchase of LA-Yuma would create a new competitive single-line service between Los Angeles and Phoenix.

[104 M. C. C. 868]

DISCUSSION AND CONCLUSIONS

In a true conversion proceeding, under section 207 of the Interstate Commerce Act, a certificate may be issued upon a showing that the applicant is fit, willing, and able to perform the service proposed and comply with provisions of the act and regulations of the Commission, and that the proposed service will be required by the present and future public convenience and necessity. The burden of showing convenience and necessity may be met in two ways. One, through evidence of past lawful operations conducted in interstate commerce under the certificate of registration, and the other, through evidence of need for the proposed transportation elicited from shipper witnesses. See *Worster—Control—McKay & MacLeod Corp.*, 85 M. C. C. 679, 686, and *Delta Lines, Inc.—Control and Merger*, 97 M. C. C. 411, 421. However, applicant pro-

poses no true conversion of its certificate of registration, for the proposed authority differs in at least some respects from that contained in the certificate of registration for which no evidence relating to State interpretation was presented. For example, there is no clear indication that any of applicant's operations from Yuma to Phoenix are authorized, or if authorized, the conditions under which service may be performed, if any. Also, applicant requests authority to serve intermediate points along a described portion of one of the proposed routes and four specified off-route points, which differs materially from service at points within the Mohawk Valley as defined in the certificate of registration. Therefore, evidence of applicant's past operations has no significant probative value for a determination here. Also, the evidence of need presented through the 10 described shippers, is considered insufficient to warrant authorization of the proposed service in view of evidence presented by the protestants. The service of existing motor carriers, much of which has not been tried by the supporting shippers, is considered more than ample to meet all their transportation needs. In view of these conclusions, no consideration of the issue of fitness is necessary here, except to say that the fitness of applicant is subject to question in view of the board's findings in its recommended report served concurrently herewith in the complaints proceeding, No. MC-C-5262. Accordingly, the application should be denied.

FINDINGS

Upon consideration of all evidence of record, the joint board finds that public convenience and necessity do not require the operation for which authority is sought, and that the application should be denied.

In view of the findings, the joint board recommends that the appended order (not printed) be entered.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
AUG 22 1969
JOHN F. DAVIS, CLERK

October Term, 1969
No. 374

HAYWOOD WASHUM, an Individual, d/b/a LOS ANGELES-YUMA FREIGHT LINES, and SVENSSON FREIGHT LINES, an Arizona Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPERSTATE LINES, CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, HOPPER TRUCK LINES, LEE WAY MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., PACIFIC MOTOR TRUCKING COMPANY, THUNDERBIRD FREIGHT LINES, INC., T.I.M.E. FREIGHT, INC., and WESTERN GILLETTE, INC.,

Appellees.

On Appeal From the United States District Court for the District of Arizona.

MOTION TO AFFIRM.

ROBERT Y. SCHUREMAN,
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Los Angeles, California.

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Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPERSTATE LINES, CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, HOPPER TRUCK LINES, LEE WAY MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., PACIFIC MOTOR TRUCKING COMPANY, THUNDERBIRD FREIGHT LINES, INC., T.I.M.E. FREIGHT, INC., and WESTERN GILLETTE, INC.,

Appellees.

On Appeal From the United States District Court for the District of Arizona.

MOTION TO AFFIRM.

Pursuant to Rule 16.1(c), The Supreme Court of the United States Revised Rules (1967), Consolidated Copperstate Lines, Consolidated Freightways Corporation of Delaware, Hopper Truck Lines, Lee Way Motor Freight, Inc., Milne Truck Lines, Inc., Navajo Freight Lines, Inc., Pacific Motor Trucking Company, Thunderbird Freight Lines, Inc., T.I.M.E. Freight, Inc.[1] and

[1]Subsequent to initiation of the case by Appellants the name of the corporation has been changed to T.I.M.E.-DC, Inc.

Western Gillette, Inc., corporations (hereafter referred to collectively as "Intervening Defendants"), Appellees herein, move that the judgment of the District Court be affirmed.

Statement.

This case involves a direct appeal from a final judgment of a Three-Judge District Court affirming orders of the Interstate Commerce Commission in an action brought by Appellants Haywood Washum, an individual doing business as Los Angeles-Yuma Freight Lines (hereafter referred to as "LAY") and Svensson Freight Lines, an Arizona corporation (hereafter referred to as "Svensson"), a copy of which is attached to the Jurisdictional Statement (hereafter referred to as "J.S.") of the Appellants as Appendix A. The background of the case is adequately stated in the reports of the Commission (J.S., App. B) and only a brief summary will be made in this motion for purposes of describing the order of events and the present posture of the instant appeal.

The Intervening Defendants filed a Complaint (hereafter referred to as "Complaint Proceeding") with the Commission on August 12, 1960, charging the Appellants herein with violations of Section 206, and subdivision thereof, and of Section 5(4) of the Interstate Commerce Act (hereafter referred to as the "Act"), (49 U.S.C.A. §§306 and 5[4], respectively), and prayed that the Commission order Appellants to cease and desist from unlawful operations and to declare the

purported Certificate of Registration of Svensson terminated by operation of law. Thereafter, Appellant Svensson filed an application with the Commission seeking the issuance of a certificate of public convenience and necessity, pursuant to Section 207 of the Act, authorizing operation as a common carrier by motor vehicle in interstate and foreign commerce between specified points in Arizona (hereafter referred to as "Certificate Proceeding"); and Appellant Haywood Washum filed an application, pursuant to Section 5 of the Act, for authority authorizing the purchase by Svensson of the interstate operating rights, transportation business and physical property of LAY, with resulting control by Haywood Washum of the resulting operations of Svensson (hereafter referred to as "Finance Proceeding").

The Complaint and Certificate Proceedings were assigned by the Commission for hearing before Joint Board No. 47, composed of E. T. "Eddie" Williams of Arizona and George E. Howard of California, and the Finance Proceeding was assigned to Hearing Examiner Samuel C. Shoup of the Commission. The California member of the Joint Board failed to appear at the hearing and the membership of Joint Board No. 47 actually participating in the proceedings consisted of the Arizona member, pursuant to the provisions of Section 205(b) of the Act (49 U.S.C.A. 305[b]). All three matters were heard on a consolidated record on May 8 through 11, 1967, and separate but entirely consistent recommended reports and orders of the Joint Board in

the Complaint and Certificate Proceedings and of the Hearing Examiner in the Finance Proceeding were served on October 20, 1967. All were unfavorable to the Appellants, who filed Exceptions thereto. Intervening Defendants replied to the Exceptions, and by Decision and Order of April 25, 1968, the Commission, by Division 3, adopted said recommended reports and orders as the orders of the Commission. Appellants thereupon filed a petition for further hearing and for reconsideration of said Decision and Order, which the Commission, by Division 3 acting as an Appellate Division, denied by Order of July 24, 1968. At that time these orders became administratively final.

On or about October 29, 1968, the Appellants filed the within action in the United States District Court for the District of Arizona, entitled Complaint and Petition for Temporary Restraining Order and Injunction, seeking to annul the above-described orders of the Commission and for temporary restraint of the order of the Commission in the Complaint proceeding. Such Commission order, by a series of orders of the District Court, has been restrained pending disposition of the appeal before this Honorable Court or further order of the District Court.

The original Complaint filed with the District Court, other than matters in justification of the request for a temporary restraining order, alleged only that the recommended reports and orders of Joint Board No. 47 and Examiner Samuel C. Shoup, as well as subsequent orders

of the Commission affirming such recommended reports and orders and denying further hearing, were arbitrary, capricious, unlawful and unreasonable, in light of the evidence adduced at the consolidated hearing. On or about December 6, 1968, the Appellants filed with the District Court a pleading entitled "Plaintiffs' Motion to Amend Complaint and for Leave to Present Additional Evidence To Court". The Amendment which was proferred by the Motion alleged that the member of Joint Board No. 47 who heard the case, along with the Hearing Examiner of the Commission, was biased and prejudiced and that, accordingly, the Appellants were denied a fair and impartial hearing and due process of law, all allegedly in violation of said Fourteenth Amendment. Attached to said Motion was the Affidavit of Appellant Haywood Washum reciting certain alleged facts relating to the alleged bias of the Joint Board member, which the affiant conceded to have been known to him on the first day of the hearing, divulged to his attorney at that time and a conscious determination made not to raise such issue. At no time in the proceedings before the Commission was such issue of alleged bias and prejudice ever raised.

In the Opening Brief of the Appellants before the District Court it was urged that the evidence did not justify a finding of common control among the Appellants in violation of Section 5 of the Act, that traffic previously handled by Svensson purportedly under its Certificate of Registration, together with the testimony of some

ten shipper witnesses, required the grant of the Certificate Application, that allegedly the Intervening Defendants had failed to establish that they would be adversely affected by the grant of the Certificate and Finance Applications, and that the denial of such applications was predicated upon the finding of common control by Joint Board No. 47, which was then alleged to be non-existent. The Reply Brief of Appellants related entirely to argument urging a purported lack of unlawful common control among the Appellants. Thereafter, the District Court, by its Order filed April 1, 1969, unanimously denied the Motion of Appellants and dismissed the Complaint filed with the Court.

In its J.S. the Appellants have now abandoned their basic and principal contention before the Commission and the District Court and state that they no longer take issue with the findings of the Commission with respect to the unlawful control of the Appellants in violation of Section 5 of the Act, but only with the alleged failure of the Commission to find that such conduct was not willful and wanton in nature (J.S., p. 5). They then state the issues before this Honorable Court to be as follows:

> "Whether the Interstate Commerce Commission may abandon a long-standing rule of practice before the Commission and apply to the Appellants a different rule not heretofore applied in motor carrier cases whereby the Certificates of the Appellants are revoked and the sale of a Certificate is denied, with the effect that Appellants are simply put out of business."

ARGUMENT.

1. The major position presently of the Appellants is that the Commission has improperly and without regard to precedent acted affirmatively to put the Appellants out of business by revoking the Certificates (sic) of the Appellants. This simply is not so. Even a cursory examination of the reports and orders of the Commission attached to the J.S. as Appendix B will reveal that there is no proceeding before the Commission seeking to revoke any of the operating authority of LAV. Other than to deny Haywood Washum authority to transfer his interstate operating authority and properties to Svensson, pursuant to Section 5 of the Act, with resulting control in himself, the Commission has issued no order whatsoever relating to LAV. LAV continues to be free to operate its interstate motor carrier business to the full extent of its operating authority and facilities. With the final termination of the Certificate of Registration of Svensson, undoubtedly even the consolidation of LAV operating authority and properties with the properties and Arizona intrastate operating authorities of Svensson may be accomplished by the filing of an appropriate application with the Commission pursuant to Section 212(b) of the Act.

So far as Svensson is concerned, the Commission has not undertaken to revoke, in the sense that such term is normally used, the Certificate of Registration of Svensson but, rather, to recognize officially the fact that such Certificate of Registration was either void on issuance or subsequently voided under the provisions of Section 206(a)(6) and (7) of the Act. The reason for such result follows from the fact that LAV is a multi-state motor common carrier authorized to provide

service between points in California and Arizona (J.S., A 33-35) and Svensson is the holder of a purported Certificate of Registration (J.S., A 35-37), the issuance and retention of which is dependent upon its motor carrier operations being limited to those wholly within the boundaries of the State of Arizona and not controlled by, controlling, or under a common control of a carrier engaged in operations outside of such State. Section 206(a)(6) and (7) of the Act. Such Certificate of Registration was issued to Svensson on June 10, 1964 (J.S., A 35), as the result of an application filed with the Commission on February 4, 1963, for a grandfather certificate of registration, verified by its President, Don Washum, in which it was represented to the Commission that no such common control existed. (J.S., A 27). The Appellants now judicially admit that the findings of the Commission of such unlawful common control between LAV and Svensson are correct, despite their earlier protestations (J.S., p. 4). Indeed, in view of the record herein and the determinations made by this Court in *Gilbertville Trucking Co., Inc., et al. v. United States*, 371 U.S. 115, 9 L. Ed. 2d 177, 83 S. Ct. 217 (1962), as to the criteria to be applied under Section 5, and subdivisions thereof, of the Act relating to common control where there are family relationships, they were left with no alternative. They complain only as to the failure of the Commission to find that such violations were willfully and wantonly in violation of Section 5 of the Act (J.S., p. 4). In view of the written admission of such common control by Don Washum (President of Svensson) on January 12, 1964 (J.S., A 25), as well as other evidence, the Commission well could have made such a finding if it

had not concluded that such finding was not necessary to dispose of the issues before the Commission (J.S., A 27).

It is crystal clear, under the provisions of Section 206(a)(6) and (7) of the Act, that the issuance of a Certificate of Registration is dependent upon the fact that there is no common control with a multi-state carrier and that the applicant is not operating outside of the single State. *Homer White, Inc. v. United States*, 281 F. Supp. 430 (1968). Accordingly, the purported Certificate of Registration was void from its inception and without regard to whether or not Svensson intended to mislead the Commission as to the true facts. Where common control exists between a single-state carrier and a multi-state carrier the termination of the Certificate of Registration results from the provisions of Section 206(a)(6) and (7) of the Act *Homer White, Inc. v. United States* (*supra*). With the judicial admission by Appellants conceding the correctness of the Commission's findings and conclusions relating to common control there simply is left no justiciable issue before this Honorable Court with respect to the correctness of the order of the Commission (J.S., A 32).

2. The second aspect of the question raised by Appellants with the Court is whether or not the Commission has failed to properly evaluate the evidence of record relating to the Certificate Proceeding. In this respect, the Appellants urge that the Commission did not properly evaluate evidence of past operations of Svensson under its purported Certificate of Registration or make findings with respect to the adverse results which would flow to the Intervening Defendants by the granting of such application. The record shows

that the Joint Board, as affirmed by Division 3, considered in considerable detail the shipper testimony (J.S., A 43-48). It also considered the existing operations of other motor common carriers at some length (J.S., A 48-56). Finally, the Joint Board considered the adverse affect of the present and proposed operations of Svensson on the existing motor carriers, especially in view of the insufficiency of available traffic (J.S., A 48-56). The Joint Board, as affirmed by Division 3, properly found that Svensson had failed to establish that evidence of past operations even fell within the scope of its purported Certificate of Registration and that the Certificate Proceeding encompassed a proposed certificate under Section 207 materially different from the purported Certificate of Registration (J.S., A 57). The Hearing Examiner of the Commission, also as affirmed by Division 3, made a similar finding in the Finance Proceeding (J.S., A 8). Thus, it is patent that the Commission considered and evaluated all of the evidence of record proffered by the Appellants relating to public convenience and necessity.

What the Appellants actually seek herein is to have the Court re-weigh all of the evidence of record relating to public convenience and necessity and reach its own determination of the same when such function properly lies with the Commission. It is fundamental that the scope of judicial review of administrative proceedings is to verify that there is substantial evidence on the record, viewed as a whole, to sustain the findings, conclusions and orders of the administrative agency. Section 10(e) of the Administrative Procedure Act, 5 U.S.C.A. §706(e). *Labor Board v. Columbian*

Enameling & Stamping Co., 306 U. S. 292, 300, 83 L. Ed. 660, 59 S. Ct. 501 (1939). It is the exclusive function of the Commission to draw such reasonable conclusions from its findings as in its discretion are appropriate. *Illinois Central R. Co. v. Norfolk & Western R. Co.*, 385 U. S. 57, 66, 69, 17 L. Ed. 2d 162, 87 S. Ct. 255 (1966). The fact that the evidence permits drawing of two inconsistent conclusions does not preclude the finding of the Commission from being supported by substantial evidence. *Consolo v. Federal Maritime Commission*, 383 U. S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966). It is not for the Court to strike down conclusions that are reasonably drawn from the evidence and findings in the case but, rather, to determine whether the evidence supporting such Commission findings is substantial. *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951); *Illinois Central R. Co. v. Norfolk & Western R. Co.* (supra). It is significant that the Appellants in their I.S. have failed to cite any section of the Act, any rule, regulation or decision of the Commission or any decision of any Court in support of any contention advanced by them. The conclusion is inescapable that there are none.

3. Appellants refer to the Motion made in the District Court relating to the request by Appellants to present evidence of alleged bias and prejudice of the Joint Board member (I.S. p. 11). It is not clear whether they urge reversal on this ground but, in any event, it is clear that the denial of such Motion by the District Court (I.S. A. 3, 21) was proper. Appellants with knowledge of the inception of the proceeding before the Commission of any matters relating to the al-

leged disqualification of the hearing officer, as is the case herein, must timely raise such issue before the Commission. Orderly administration by the Commission and fairness to litigants before the Commission require such rule. *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 36-37, 97 L. Ed. 54, 73 S. Ct. 67 (1952). Such rule is consistent with the general rule involving review of orders of the Commission before the Courts wherein a litigant has sought to inject evidence of various nature for the first time before the Courts. *United States v. Capital Transit Co.*, 338 U.S. 286, 291, 94 L. Ed. 93, 70 S. Ct. 115 (1949). In any event, the Appellants do not urge herein that the Commission failed to receive any material evidence proffered by it or that any material evidence was improperly received. Both the Hearing Examiner and the Joint Board made consistent findings on crucial matters, which findings, as well as the conclusions and orders of the Joint Board and the Hearing Examiner, were independently ratified and affirmed by the Commission, acting through Division 3.

Conclusion.

The Interstate Commerce Commission has regularly pursued its duty under the Interstate Commerce Act and has made findings and conclusions therefrom fully sustained by the record before the Commission. The final orders of the Commission are entirely consistent with and required by the Findings and Conclusions of the Commission in the three proceedings before it. The fact that Appellants would have this Court reach conclusions

question which justifies further argument before this Court. For all of the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

CONSOLIDATED COPPERSTATE LINES,
CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,
HOPPER TRUCK LINES,
LEE WAY MOTOR FREIGHT, INC.,
MILNE TRUCK LINES, INC.,
NAVAJO FREIGHT LINES, INC.,
PACIFIC MOTOR TRUCKING COMPANY,
THUNDERBIRD FREIGHT LINES, INC.,
T.I.M.E. FREIGHT, INC. and
WESTERN GILLETTE, INC.,

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SUPREME COURT, U. S.

SEP 23 1969

JOHN F. DAVIS, CLERK

No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1969

HAYWOOD WASHUM, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 371

HAYWOOD [illegible], ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a decision of a three-judge district court (28 U.S.C. 1253, 2284) dismissing a complaint brought to set aside certain orders of the Interstate Commerce Commission (49 U.S.C. 15, 16, 17, 17a). The Commission found that appellants had [illegible] in violation of Section [illegible] A stay of judgment was granted by the district court pending appeal to this Court.

of the Interstate Commerce Act (49 U.S.C. 5(4)) and therefore that Svensson Freight Lines ("Svensson") had improvidently been granted a certificate of registration under Section 206(a)(7)(A) of the Act (49 U.S.C. 306(a)(7)(A)); (2) denied appellants' application for authority under Section 5 of the Act for the purchase by Svensson of Los Angeles-Yuma Freight Lines ("L.A.-Yuma"); and, (3) denied Svensson's ap-

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[1] Section 206(a)(7)(A) provides in part that

> In the case of any person whose motor vehicle operations on October 15, 1962, were in operation solely within a single State and consisted of common carriage by motor vehicle in interstate commerce (including persons controlled by, controlling, or under a common control with a carrier engaged in operations outside such State), and who or which was also lawfully engaged on such operations in interstate or foreign commerce under the certificate exemption provisions of the second paragraph (11) of this subsection, as in effect immediately before October 15, 1962, [etc.] the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. Such certificate of registration shall not extend to more than the service authorized by the State certificate to be conducted in interstate commerce. [etc.] Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. [exemption] shall be held only so long as the holder is a person engaged in operations solely within a single State, but controlled by, controlling, or under a common control with a carrier engaged in operations outside such State, and except as provided in section 5 of this title and to the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission. [etc.] (Emphasis added.)

plication for common carrier interstate authority under Section 207 of the Act (49 U.S.C. 307).

L.A. Yuma, owned by Haywood Washum, is a motor common carrier authorized by the Commission to operate primarily between Los Angeles, California and Yuma, Arizona. Swanson, ostensibly owned by Haywood Washum's son, Donald Washum, holds a "grandfather" certificate of registration issued by the Commission under Section 206(a)(1) of the Act, authorizing it to engage as a single-state carrier in interstate commerce to the extent authorized by an intrastate certificate issued by the State of Arizona, primarily a restricted westbound general commodities authority from Phoenix to Yuma (I.C.S. A-17, A-19). The Commission found, however (I.C.S. Vol. A-12), that since 1957, L.A. Yuma and Swanson had been operated essentially as a single carrier by combining their respective multi-state and single-state authorities so as to perform a single-line service between Los Angeles and Arizona points including Phoenix. The Commission's finding of common control is not contested here (I.C.S.).

In August 1960, certain carriers providing service between Los Angeles and Arizona points filed a complaint alleging such a common interest between L.A. Yuma and Swanson in violation of Sections 5(4) and 5(6) of the Act (I.C.S. A-10). Subsequently, Swanson filed an application under Section 5 for authority to purchase L.A. Yuma, a grant of which would have legitimized those operations which were the subject of the complaint. Swanson also filed an application under Section 207 of the Act (49 U.S.C. 307) seeking

dently granted was not in issue either before the Commission or in the court below. Appellants attacked only the underlying finding of common control, which is not challenged in this Court. Appellants may not raise this issue for the first time in this Court. *United States* v. *Louisville Trust Co.*, 334 U. S. 54, 59.

There is no substance to the contention that appellants will be "put out of business" by the Commission's orders. L. V. Young's certificate of authority was not affected by these orders, and Swenson remains free to engage in interstate commerce to the extent authorized by its interstate certificate. Participation by Swenson in interstate movements will be terminated, but Swenson was never entitled to participate in such movements.

In the [illegible] proceedings [illegible] would result from the acquisition, appellants had the burden of showing that the public convenience and necessity required the grant of the purchase application. *Bingaman Motor Freight Lines, Inc.* v. *United States*, 243 F. Supp. 98, 99 (W. D. Texas), affirmed per curiam, 380 U. S. 160; *General Coastal Express Co.* v. *United States*, 241 F. Supp. 941, 944 (D. Nev.), affirmed *per curiam*, 382 U. S. 160. Similarly, in the Section 207 application proceeding, Swenson had the right that the public convenience and necessity required the conversion of its certificate of registration to a certificate of public convenience and necessity, as well as the grant of operating rights not authorized by its

underlying Arizona certificate. Appellants met neither of these burdens. Unlawful past operations, while not necessarily a bar to a grant of authority, ordinarily cannot be used to demonstrate continuity of prior operations (*i.e.*, as evidence to show that a grant of a certificate is required by the public convenience and necessity), so as to serve as a basis for approval of a purchase application. *Consolidated Coppersmith Lines v. United States*, 293 F. Supp. 858 (CD Calif.), affirmed *per curiam*, 391 U.S. 710; *see Gilbertville Trucking Co.*, *supra*, at 128. The Commission found (in its Order on Reconsideration, *infra*) that existing service was adequate to meet the shipping public's reasonable transportation needs, and that, therefore, no public need was shown for appellants' proposed service. Appellants virtually admit the correctness of the finding, arguing only that denial of their application would result in a "windfall" to the protestants (Br. 10). This "windfall", however, is no more than an opportunity to regain traffic unlawfully diverted from them to appellants.

3. Appellants' allegation of a question of bias on the part of the Joint Board (Br. 11) was not raised before the Commission and was raised in the district court only after it moved to dismiss. The court properly refused to consider the issue (*United States v. Carlo Bianchi & Co.*, *supra*).

Appellants erroneously interpret the authority sought under section 5(2)(c) (Br. 12). Section 5(2)(c) provides that, when a person lawfully engaged in carrier operations becomes affiliated with another carrier, the Commission may approve the transaction if it finds that the transaction will be consistent with the public interest. Section 5(2)(c) does not require the Commission to find that the public convenience and necessity will be served by the transaction, as is required by section 5(2)(a) (1) (A) for the grant of new authority. Thus, the Commission's finding that appellants' proposed service was not required by the public convenience and necessity is irrelevant to the issue of whether the transaction is consistent with the public interest.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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September 1969.

petitions, filed June 3, 1968, seeking further hearing in these proceedings, reconsideration of the Decision and Order of this Division, dated April 28, 1968, which adopted the order of the hearing examiner in No. MC F-9618 denying the section 5 application, and also adopted the orders of Joint Board No. 47 in No. MC 96784 (Sub-No. 2), denying the section 207 applications, and in No. MC C-5362, which properly found, essentially, that defendants Haywood Washum and Ben Washum, and each of them, were exercising control and management in a common interest of the operations of Haywood Washum, an individual doing business as Los Angeles-Yuma Freight Lines, a guilty State certificated carrier, with the operations of defendant Southwest Freight Lines, a single State carrier holding a certificate of registration issued under the grandfather provisions of section 206(a) of the Interstate Commerce Act, and required cancellation of the latter carrier's certificate of registration and ordered cease and desist to cease and desist operations in interstate commerce; (2) the motion of protestants, filed June 17, 1968, seeking to strike the petition in item (1) in its entirety, and (3) the reply of applicants, filed June 24, 1968, to the motion under (2); and

It appearing, That the decision and order of April 28, 1968, inadvertently failed to consider the petition of applicants, filed March 1, 1968, seeking further hearing in No. MC F-9618 and No. MC 96784 (Sub-No. 2) for the same reasons which such relief is now requested, which petition was replied to by protestants on June 24, 1968, subsequent to issuance of said decision and order; and

It further appearing, That except to the extent that applicants' petition described under (1) seeks such further hearing, applicants have no right to reconsideration of the Division's decision and order, and

no right to modification of the effective date of this Division's decision and order in view of Rule 1.101 (a)(2) of the Commission's General Rules of Practice which provides for administrative finality of Division decisions except under certain circumstances not operative here, and therefore warrants dismissal of the petition to the extent it seeks such relief;

It further appearing, That the petition under (1) also seeks further hearing and relative to the matter of whether and to what extent if any applicants had demonstrated a public need for the service proposed in No. MC F 9618 and No. MC 96781 (Sub-No. 2), and whether and to what extent protestants' service was or was not adequate to meet the transportation requirements of the shippers supporting both applications. In this connection, the record shows that two of said shippers, the San Luis Sonora, Mexico, well driller, and the customs broker with offices and warehouse facilities at San Luis, Ariz., and Calexico, Mexico, supported the application because they required for-hire transportation of traffic intended for export to Mexico which would be transported by Swanson within the confines of Arizona and which has moved from, or will move to points beyond Arizona in private carriage to Mexico, and that such transportation under the circumstances is, so far as the for-hire transportation is concerned, not in interstate commerce subject to economic regulation under part II of the act, and therefore is of no probative value relative to the matter of public need for the proposed service. See *Motor Transportation of Property Within a Single State*, 91 M.C.C. 511, 561, sustained in *The Pennsylvania Railroad Company v. United States of America and Interstate Commerce Commission*, 242 Fed. Supp. 890 (E. D. Pa., 1965), and affirmed *per curiam* in *Pennsylvania Railroad Co. v. United States, et al.*, 382 U. S. 372 (1966). The record further shows

that the remaining 8 shippers were aware of the availability of protestants' service chiefly between Phoenix, Ariz., and Los Angeles, Calif., which was considered satisfactory, but was largely untried by said shippers as opposed to their substantial reliance by such shippers on the past unlawful combined service of applicants between those points; that their support for the proposed service is predicated on their preference for single line service thereto of Svensson if the applications could be approved; and that, under these circumstances, it appears that little public need has been demonstrated by applicants for their proposed service; that public need can and will be served as well by protestants; and that, under these circumstances, the public need could not be best served by applicants' proposed service without harm to protestants. Based on the foregoing, we are of the opinion that applicants' petition under (1), to the extent it seeks further hearing, presents no facts or arguments which would establish that the said decision and order of April 28, 1968, was incorrect in finding that the findings of the hearing examiner in No. MC–F–9618 and of Joint Board No. 47 in No. MC-96784 (Sub-No. 2) were proper and correct in all material respects; or which would warrant further hearing or a different decision; and therefore, denial of the petition under (1) to the extent it seeks further hearing, is warranted; and

It further appearing, That, in view of our findings above, protestants' motion under (2) seeking to strike applicant's petition under (1) in its entirety is moot and should be dismissed:

It is ordered, That applicants' petition under (1) to the extent it seeks modification of the effective date of the decision and order of April 28, 1968, and reconsideration of the findings of said decision and order

be, and it is hereby, dismissed, and, to the extent the petition under (1) seeks further hearing in No. MC-F-9618 and No. MC-96784 (Sub-No. 2), it be, and is hereby, denied; that, further, protestants' motion under (2) to strike applicants' petition under (1) in its entirety be, and it is hereby, dismissed.

It is further ordered, That the order of April 28, 1968, shall be effective 60 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

[SEAL] H. NEIL CARSON,
Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. 374.

HAYWOOD WASHUM, an Individual, d/b/a LOS ANGELES-YUMA FREIGHT LINES, and SVENSSON FREIGHT LINES, an Arizona Corporation,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPERSTATE LINES, CONSOLIDATED FREIGHT WAYS CORPORATION OF DELAWARE, HOPPER TRUCK LINES, LEE WAY MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., PACIFIC MOTOR TRUCKING COMPANY, THUNDERBIRD FREIGHT LINES, INC., T. I. M. E. FREIGHT, INC., and WESTERN GILLETTE, INC.,
Appellees.

Appeal from the United States District Court for the District of Arizona.

APPELLANTS' REPLY TO MOTIONS TO AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 374.

HAYWOOD WASHUM, an Individual, d/b/a LOS ANGELES-YUMA FREIGHT LINES, and SVENSSON FREIGHT LINES, an Arizona Corporation,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED COPPERSTATE LINES, CONSOLIDATED FREIGHT WAYS CORPORATION OF DELAWARE, HOPPER TRUCK LINES, LEE WAY MOTOR FREIGHT, INC., MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., PACIFIC MOTOR TRUCKING COMPANY, THUNDERBIRD FREIGHT LINES, INC., T. I. M. E. FREIGHT, INC., and WESTERN GILLETTE, INC.,
Appellees.

Appeal from the United States District Court for the District of Arizona.

APPELLANTS' REPLY TO MOTIONS TO AFFIRM.

The argument advanced by the government in the Motion to Affirm at the bottom of page 5 and continuing to page 6 in the statement that

> "The Commission's holding that Svensson's certificate of registration was improvidently granted was not in issue, either before the Commission or in the court below"

comes somewhat as a shock to the appellants. It serves only to point up that about which they have continuously complained from the inception of this proceeding to the present, which, in effect, is that one of the pivotal considerations in the Commission's determination that the certificate of Svensson had been improvidently granted, and that its registration therefore was void ab initio was necessarily by definition incorrect.

The record in this proceeding will reflect that prior to the time of its purchase by Don Washum, the certificate of Svensson had been the subject of an earlier equivalent of registration in that it was a "second proviso" operator who had authority under the law prior to the enactment of 49 U. S. C. 306(a)(7)(A) to operate within a single state without the type registration required since October 15, 1962, of single state operators.

The registration of the Svensson certificate by its present owner, Don Washum, effectuated pursuant to 49 U. S. C. 306(a)(7)(A), was merely a continuation in effect of the operations previously conducted under the second proviso of the Motor Carrier Act as it stood prior to the amendment which became Section 206(a)(7)(A).

Since the authority originally was issued to an individual named Svensson, subsequently incorporated into the corporation which is Svensson Freight Lines, long before there was any relationship between any of the Svenssons and any of the Washums, a finding that the registration was void ab initio is simply incorrect.

Svensson received its substantive right to transport interstate commodities as a single state operator by virtue

of a so-called "second proviso" registration long before it was owned by Don Washum. In 1962, the Interstate Commerce Act, Section 206(a)(7)(A) was amended so as to award single state operators an actual certificate in lieu of their former registration. All single state carriers having valid second proviso registrations at that time had only to file an application to be awarded the permanent certificate. That procedure was nothing more than a mechanical device by which one form (the registration) which evidenced the substantive right to transport interstate traffic was changed by the substitution of another form (the certificate). The substantive right actually accrued to Svensson in the 1950's and has never in fact been revoked by due process of law.

That being the case, the actions of the Commission in this matter have not conformed with its statutory requirements in connection with the handling of applications. Svensson filed two applications, one of which was an effort to convert its Section 206(a)(7)(A) certificate into a full fledged certificate of public convenience and necessity. The burden of proof for so doing has never been as stringent as the burden of proof for the institution of a new operation, so that in order to convert such certificate, a showing is generally needed only that the transportation involved is in progress and that it is in the public interest for it to continue. In this case, the Commission found that since the Section 206(a)(7)(A) certificate was void in its incipiency, that there was nothing to convert and therefore put Svensson to the much sterner burden of proving convenience and necessity for a totally new operation which was not a burden which Svensson was required to bear, nor one which it conceived it was required to bear at the time of the hearing.

Furthermore, the Commission has always held that past unlawful activities by an applicant are not an absolute bar

to the granting of any application. In that connection, the Commission has always held that it was required to balance the proof of public need and the proof of public interest against the alleged unlawful activities. In those cases where the public interest or public need outweighed the effects of the unlawful activity, the Commission has granted the applications.

Here, since the Commission found that there was no certificate to convert, it in no way balanced any of the equities arising from the public need or public interest against the unlawful activities complained of, with the result that the public is now to be deprived of a service which it both needs and has enjoyed for some years and the Washums are to be put out of business.

The proceedings in the District Court challenged the orders of the Interstate Commerce Commission and recited at page 5 that the plaintiff prayed that:

> "The orders of the Interstate Commerce Commission entered heretofore in the above referred to matters be annulled and set aside."

It comes with ill grace now for the government to take the position that the matter was not raised and was not an issue before the Commission and before the District Court.*

To advance, as is advanced in the argument supporting the Motion to Affirm, that the only matters before the District Court had to do with the substantiality of the evi-

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* Since also, as reflected by the testimony in the proceeding, everything which was done either by Svensson or its owner, Don Washum, was done with the advice and approval of a representative of the Commission, it comes with similar ill grace for the Commission to say that with full knowledge of whatever conditions were at the time of the registration of the Svensson certificate, it participated in the issuance of an invalid registration and a subsequent unlawful certificate.

dence is a distortion of the proceeding. Obviously, the defendants in the complaint proceeding before the Commission, plaintiffs in the court below, took issue with every factual matter which might conceivably be presented in the Commission proceeding, and these same parties brought before the District Court every conceivable issue available to them then, as they now bring before this court every issue which may be presented within the confines of a jurisdictional statement and Reply to a Motion to Affirm. Other matters require plenary briefs and argument.

We do not understand that there was at the time, or that there is now, any impropriety in a defendant in a complaint proceeding or a plaintiff in a review proceeding before a District Court raising every issue of which the case admits. We are not advised by the law nor persuaded by the pleading on behalf of the government that only questions of substantiality of the evidence may be raised when the Interstate Commerce Commission has acted without warrant in the law. This case in its present posture and in its posture before the District Court posed and presented questions of substance, among which were questions of the substantiality of the evidence, but neither the complaint, the argument, nor the pleadings circumscribe the proceedings to the extent that only questions of substantiality of evidence were raised. That assertion, coupled with the quotation from the District Court's opinion that the Commission's findings were supported by substantial evidence, appears to be advanced as sufficient forever to lay this matter to rest. Such may evolve to be entirely correct, but the correctness will arise not out of the assertion on behalf of the government, but out of the adjudication by this Court.

On page 7 of the Motion on behalf of the government in a footnote, the assertion is made that the appellants

have erroneously characterized the authority held by Svensson. The record in this proceeding will reflect that, pursuant to this authority, without prior complaint before the Arizona Commission or before the Interstate Commerce Commission, from the date of the inception of motor carrier regulation until the present time, Svensson Freight Lines has been transporting commodities both eastbound and westbound between Yuma and Phoenix, as it has a perfect right to do.

The slight difference mentioned in our earlier pleading is provoked by the recognition that the Svensson authority lacked the unquestioned artistic draftsmanship of the government's Motion to Affirm. Nonetheless, the certificate says what it says, the certificate authorizes what it authorizes, and the parties most closely concerned with it for three decades have considered that it authorized eastbound transportation. Absent the government's statement to the contrary, it does authorize what the citizens of Arizona have considered it, being a creature of Arizona, to authorize.

Significantly, even the Joint Board, composed of Eddie Williams of Arizona, was not in a position to say, and did not say, that the certificate did not authorize eastbound transportation (JS A-57). He, smarting under charges of bribery advanced by these appellants, only questioned.

CONCLUSION.

In Summary, appellants have been deprived of valuable rights continuously exercised by them and their predecessors for more than a quarter of a century, in a manner that departs from lawfully authorized procedure.

Their redress is to them substantial, as are the questions here raised.

For these reasons, they pray that this Court note jurisdiction.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969.

WASHUM, DBA LOS ANGELES-YUMA FREIGHT LINES, ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

No. 374. Decided October 27, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.